Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

ARWEN BIRD,

*Petitioner,*

v.

LEWIS & CLARK COLLEGE, THOMAS DARROW, Ph.D. and LARRY A. MEYERS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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154 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Has a federally funded college violated the anti-discrimination provisions of Section 504 of the Rehabilitation Act (Section 504) or Title III of the Americans with Disabilities Act (Title III), when a student with a disability must be carried by her untrained classmates into and out of classrooms, restrooms, cafeterias, buses, and other facilities (throughout a semester) because that college did not select and provide wheelchair accessible facilities?

2. Must a federally funded college make its benefits and services readily accessible to otherwise qualified students with mobility impairments unless it can prove that providing such access would cause an "undue financial and administrative burden" or would "fundamentally alter" the nature of the benefits and services?

3. Has a federally funded college violated Section 504 or Title III when only the student with a disability is pressured to sign a written contract, by which the college may unilaterally exclude her from class activities without conducting any objective, individualized analysis of whether the student may safely participate in such activities?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Arwen Bird, an individual (Appellant/Cross-Appellee), and Respondents Lewis & Clark College, Thomas Darrow, Ph.D., and Larry A. Meyers (Appellee/Cross-Appellants).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (per Goodwin, Circuit Judge, joined by Nelson, T.G., and Fletcher, Wm.) is reported at 303 F.3d 1015, and is reproduced in the Appendix. (App. 1-17) The opinion of the United States District Court for the District of Oregon (District Court), denying Respondents' second Motion for Summary Judgment and Petitioner's Cross-Motion for Summary Judgment, is published at 104 F.Supp.2d 1271, and is included in the Appendix. (App. 18-34)

Opinions not otherwise published and included in the Appendix are the opinion denying Respondents' first Motion for Summary Judgment and ruling that Section 504 and the ADA apply extraterritorially to Respondents' conduct (App. 35-47); the Order of the Verdict and Judgment (App. 48-50); the District Court's Order denying the Motion for a New Trial (App. 51); and the Order of the Ninth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc. (App. 52-53)

## STATEMENT OF JURISDICTION

The judgment of the panel of the United States Court of Appeals for the Ninth Circuit was entered on September

3, 2002. (App. 1-17) The Petition for Rehearing En Banc was denied on October 16, 2002. (App. 52-53) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## PERTINENT STATUTES AND REGULATIONS

The provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulations from 34 C.F.R. part 104, are primary to this petition and are reprinted in the Appendix. (App. 54-62) The pertinent sections of the Americans with Disabilities Act of 1990 and its regulations are quoted below. In addition, the relevant regulations of Section 504, which have been adopted into the regulations of Title II of the ADA, at the direction of Congress, are reprinted in the Appendix. (App. 72-77)

The provisions most central to the questions presented by this petition provide:

> No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, . . . housing, . . . transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

34 C.F.R. § 104.43(a) (App. 58-59); See also: 42 U.S.C. § 12182.

## STATEMENT OF THE CASE

This case raises fundamental questions concerning the anti-discrimination provisions of Section 504 of the Rehabilitation Act of 1973 (Section 504) 29 U.S.C. § 794, and Title III of the Americans with Disabilities Act (Title III) 42 U.S.C. § 12181, *et seq*.

The central issue is whether the anti-discrimination provisions of these statutes require federally funded educational institutions to make the benefits and services they offer readily accessible to students who must use wheelchairs. Petitioner asserts the answer is yes, subject to only two limited exceptions. Federally funded educational institutions are required to provide the basic services they offer (*e.g.*, restrooms, dormitories, buses, cafeterias, classrooms, and libraries) in facilities that students with mobility impairments "can enter and leave without assistance from others."[1] This is not to say that every restroom, dorm room, and classroom on a college campus must be wheelchair accessible. 34 C.F.R. part 104, Appendix A, Subpart C, No. 20. (App. 60-62) However, where there is only one restroom available, for example, that restroom must be readily accessible for students who must use wheelchairs. *Id.* The only exception to this general rule, applicable to the facts of this case, is that the educational institution may prove that providing such access would result in "undue financial and administrative

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[1] Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 F.R. 36035 (August 14, 1978). Uniform Federal Accessibility Standards Appendix to 41 C.F.R. Ch. 101-19.6.

burdens."[2] *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); 28 C.F.R. § 35.150(a)(3); and 28 C.F.R. § 39.150(a)(2).

In addition, such institutions may provide individuals to carry persons with disabilities, as a substitute for independent wheelchair access, but "only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying." Appendix A to 28 C.F.R. § 35.101, *et seq.*, Subpart D, 35.150(b)(1). "Manifestly exceptional cases" would include the narrow, metal stairways of "an oceanographic vessel." *Id.*

Petitioner Arwen Bird is paralyzed from the waist down and must use a wheelchair. There is no dispute that Petitioner is an otherwise qualified individual with a disability, as defined under Section 504 and Title III, and that Respondent Lewis & Clark College ("the College") is subject to the anti-discrimination provisions of these statutes.

Petitioner's claims arise from the fact that she applied to participate in the Spring 1996 semester ("the semester") of study offered by the College. She received notice of her acceptance for the Spring 1996 semester in December of 1994. However, Respondents planned the semester – including housing, meals, classrooms, travel, and field activities – without selecting facilities that would allow

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[2] For reasons that will be explained herein, the "fundamental alteration" exception and the less demanding "readily achievable" standard of Title III do not apply to the facts of the present case.

Petitioner wheelchair access to fulfill her most basic human needs. Almost every day of the semester, Petitioner was not able to gain access to some basic facility (housing, restrooms, eating facilities, transportation) unless she was carried or otherwise assisted by her untrained classmates. (App. 82-111)

Petitioner's complaint originally was filed in the Circuit Court of the State of Oregon, for the County of Multnomah. The complaint alleged violations of Section 504 and Title III of the ADA, as well as other common law claims. Respondents removed the case to the United States District Court for the District of Oregon, based upon Federal question jurisdiction, under 29 U.S.C. § 1331, as to Petitioner's Section 504 and ADA claims.

Although a significant portion of the facts which give rise to Petitioner's claims occurred outside the territorial boundaries of the United States, there is no question presented in this case concerning the extraterritorial application of Section 504 or Title III. The District Court ruled that Section 504 and Title III of the ADA applied to Respondents' conduct while they were outside the United States. On appeal, the Ninth Circuit Panel did not reach the issue of extraterritoriality because it ruled Respondents' failure to make its benefits and services readily accessible was not a violation of Section 504 or Title III regardless of where the relevant events occurred.

Instead, this petition is submitted because the District Court and the Ninth Circuit Panel, without explanation, have analyzed the facts of this case under a variety of legal standards which have no application to a federally funded college's duty to provide wheelchair access for its students.

Since 1979 and this Court's decision in *Southeastern Community College v. Davis*, *supra*, the Courts, Federal Administrative Departments, and Congress have tailored a spectrum of standards to be applied for virtually every circumstance that may arise under Section 504 and, more recently, the ADA. This spectrum includes the "readily achievable" standard, the "reasonableness" standard, and the "undue financial and administrative burden" standard. The level of demand placed upon covered entities corresponds to considerations such as the financial status of the entity, the nature of the services provided, and whether the accommodation at issue is individually requested or prospectively required by law.

In the present case, the covered entity receives approximately $10,000,000 per year from the Federal Government in exchange for its written assurance that it will comply with Section 504. (App. 112-116) The nature of the services provided includes education and basic services such as housing and restroom facilities. Since 1981, the College has been required, prospectively, to make the benefits and services it offers readily accessible to persons with mobility impairments. As a result, a higher standard is placed upon the College and its employees, Respondent Darrow and Respondent Meyers. In particular, Respondents are subject to the "undue burden" and "fundamental alteration" standards – not the less demanding and more subjective standards applied, for example, to a small privately funded employer or for a student with a learning disability. Compare 28 C.F.R. § 35.150(a)(3) with 34 C.F.R. § 104.44 and 34 C.F.R. § 104.12.

At trial, there was consistent agreement that Respondents had not selected or provided readily accessible facilities for Petitioner. Witnesses for both Petitioner and

Respondents testified about the numerous occasions when Petitioner was carried by her classmates onto and off of buses; onto and off of toilets; across slippery floors to and from showers; and up and down stairs to classrooms, the library, and eating facilities.

Respondents raised neither the "undue financial and administrative burden" nor "fundamental alteration" exception to their duty, under Section 504, to make benefits and services readily accessible for students with mobility impairments. Respondents offered no evidence of any additional cost or administrative burden that would have resulted had they selected and provided readily accessible facilities.

Because the nature of the benefits and services offered in facilities such as restrooms, housing, and classrooms does not change as a result of providing wheelchair access, the "fundamental alteration" exception did not apply. In addition, the College is subject to the "readily achievable" standard of Title III. However, because the "readily achievable" standard is less demanding, only the "undue burden" standard must be analyzed here. 28 C.F.R. part 35, Appendix A, Section 35.150.

Respondents never argued that readily accessible facilities were not available or that the facilities provided were of the "manifestly exceptional" character required to allow carrying Petitioner. There was no evidence or testimony presented to prove Petitioner's classmates had any training at all, much less the formal training required under Section 504.

Petitioner proffered a jury instruction quoted directly from Section 504 regulations approved by Congress. That instruction would have given jurors the definition of

"readily accessible" and informed them of the long-established rule that allowing untrained individuals to carry a person with a disability is never a lawful substitute for providing wheelchair access. See: 43 F.R. 36035 and 28 C.F.R. § 35.150, *supra*. The District Court would not give the instruction.

The jury questionnaire for Section 504 simply asked whether Respondents had discriminated against Petitioner on the basis of her disability. However, the jury instructions reserved the issue of whether Respondents violated the ADA and any issues concerning structural access in Australia to the Court. The jury found no violation of Section 504, and the District Court found no violation of Section 504 or the ADA.

The undisputed facts did not change on appeal. The Ninth Circuit Panel was provided a list summarizing 22 separate locations where Petitioner had no access to her assigned housing, restrooms, classrooms, eating facilities, or buses unless she was carried or otherwise assisted by her untrained classmates. Respondents did not disagree with the accuracy or veracity of that list. Still, the Ninth Circuit found no violation of Section 504 or the ADA and found no error in the District Court's failure to give the proffered instruction described above.

Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc with the Ninth Circuit, which was denied on October 16, 2002.

## REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for any one of several compelling reasons:

First, this case presents a question of exceptional national importance.

Second, the decision of the Ninth Circuit ignores the express intent of Congress. In effect, the Ninth Circuit has elected to disregard Federal law.

Finally, the decision of the Ninth Circuit conflicts with decisions of this Court and every other Federal Court to rule on the issue of wheelchair access since *Southeastern Community College v. Davis, supra*.

### I. QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

There are 52.6 million Americans with disabilities; of these, 2.2 million are mobility impaired and must use wheelchairs.[3] Under the precedent set by the Ninth Circuit Court of Appeals, the Americans with Disabilities Act and the Rehabilitation Act can no longer secure for persons with disabilities the right to use restrooms or take showers with the same respect for their dignity and privacy as other members of our society.

At a minimum, the Ninth Circuit's decision rewrites 20 years of civil rights law for every student in this country who must use a wheelchair. These students have now

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[3] These statistics are based upon a February 2001 report of the Census Bureau. See: http://www.census.gov/prod/2001pubs/p70-73.pdf

been served notice that they may be carried, by untrained peers, into restrooms, onto and off of toilets (including toilets placed in the center of a public restroom where there can be no privacy), into and out of eating facilities, classrooms, libraries, dormitories, and onto and off of buses.

The Ninth Circuit's decision reinstates the discredited "Separate but Equal" doctrine, 49 years after *Brown v. Board of Education.*[4] The effect of the Ninth Circuit's ruling is that once again it is acceptable for a student (even when the student has paid the same $11,590 tuition as the other students) to be excluded, segregated, and humiliated to such an extreme that her health and safety are placed in jeopardy. According to the Ninth Circuit, so long as the student finishes the semester, no harm is done. For that matter, according to the Ninth Circuit, so long as she ultimately receives a grade, any grade – even if that grade is a "D" because she cannot enter libraries, classrooms or lecture halls – no harm is done. "Separate" is once again "equal."

Under the Ninth Circuit's analysis, Rosa Parks had no grievance for being forced to give up her seat to a white man. She was, after all, allowed to stand in the back of the bus and eventually arrived at her destination.

The Ninth Circuit did not question, nor did the Respondents ever deny, undisputed evidence that *more than half* the locations provided Petitioner were not wheelchair accessible. The class spent only 12 days of the 106-day

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[4] *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

semester in field locations. Otherwise, the class was in modern locations, primarily Sydney and Brisbane, with a short visit to the capital of Australia, Canberra. The totality of the discrimination is that of the 106-day semester, accessibility was only available on 12 days. These 12 days were primarily during Petitioner's free time when she and her friends were able to find accessible locations. (App. 82-111)

Indeed, so pervasive and relentless was the pattern of discrimination against the Petitioner that she was told she should just wet her bed at night and that she should be permanently catheterized so that she would not be such a problem. Petitioner also was the **only** student for whom a contract was written that would allow the College to unilaterally exclude her from class activities. This contract prohibited Petitioner from even discussing what activities were "appropriate" for her. (App. 117-119)

Allegedly this contract was prepared because of health and safety concerns. However, no effort was made to determine whether Petitioner could safely participate based upon "current medical knowledge or on the best available objective evidence." *Anderson v. Little League Baseball Inc.*, 794 F.Supp. 342, 344 (D.Az. 1992), citing *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). This has been the standard since *Southeastern Community College v. Davis and Arline, supra.*

With full knowledge of this conspicuous and undisputed evidence of discrimination, the Ninth Circuit ruled that Lewis & Clark College is the first Section 504 defendant since 1981 that can evade its duty to provide wheelchair access, without presenting any evidence at all that

providing such access would result in "undue financial and administrative burdens." Furthermore, the Ninth Circuit's ruling condones the College's continued receipt of millions of Federal dollars each year, in spite of its failure to provide wheelchair access, and despite its written assurances to the contrary. (App. 112-116)

To reach its ruling, the Ninth Circuit analyzed the facts under standards which have nothing whatsoever to do with wheelchair access for a student of a federally funded college. The inapplicable standards used by the Ninth Circuit include the terms "meaningful access" from disparate impact case law, and "reasonable accommodations" from case law, statutes, and regulations about an individual's request for modifications to policies, practices and procedures.

The Ninth Circuit also applied the phrase, "program when viewed in its entirety," as if 20 years of regulations and case law interpreting that phrase did not exist. The result is a decision that is in conflict with decades of established law, which threatens the hard-earned civil rights of all protected minorities. There is no question that Congress intended to extend to individuals with disabilities the same protections of Federal civil rights law that have prohibited "discrimination on the basis of race, color, sex, national origin, religion, or age." 42 U.S.C. § 12101(a)(4).

Thus, the Ninth Circuit's decision conflicts with 49 years of civil rights law. In fact, due to the parallel language and interpretation of Section 504, Title IV, Title IX, and the Age Discrimination Act, under the Ninth Circuit's decision, recipients of Federal funds may now exclude members of other protected minority groups from restrooms, classrooms, housing, and eating facilities with

impunity. Such exclusion will not be considered discrimination, so long as the recipient provides access some of the time and the individual manages to attain the ultimate benefit offered in spite of persistent exclusion, segregation, and humiliation.

A new defense to discrimination now exists in the Ninth Circuit. By virtue of the Ninth Circuit's decision, a university's cafeteria staff can require African-American students to sit in a segregated eating area on Tuesdays and Thursdays, and so long as those students may sit in a nonsegregated section on Mondays, Wednesdays, and Fridays, the university has a complete defense.

At a minimum, the lives of the 52.6 million Americans who have disabilities are as affected by the Ninth Circuit's decision as their lives are affected by Section 504 and the ADA. Consequently, review and redress of the Ninth Circuit's decision is of Exceptional National Importance.

## II. THE NINTH CIRCUIT DECISION IGNORES THE EXPRESS INTENT OF CONGRESS

The intent of Congress has never been more clearly articulated than it is within the opening provisions of the Americans with Disabilities Act. Discrimination on the basis of disability is no longer acceptable, regardless of whether such discrimination manifests through isolation and segregation due to "architectural [and] transportation, . . . barriers," "outright intentional exclusion," unfounded "stereotypic assumptions," or "overprotective rules." 42 U.S.C. § 12101(a)(2),(3), and (5).

"The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full

participation, independent living, and economic self-sufficiency for such individuals;" 42 U.S.C. § 12101(a)(8).

The Federal law governing Respondents' conduct is explicit, comprehensive, and absolute. The words are:

"may not make selections [of sites and locations of facilities] . . . that have the effect of . . . subjecting [handicapped persons] to discrimination." 34 C.F.R. § 104.4(b)(5).

"shall provide . . . accessible housing." 34 C.F.R. § 104.45(a).

"shall offer . . . courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements." 42 U.S.C. § 12189.

"may not, directly or through contractual . . . arrangements . . . [a]id or perpetuate discrimination." 34 C.F.R. § 104.4(b)(1)(v); See also 42 U.S.C. § 12182(b)(1)(D).

"may not, directly or through contractual . . . arrangements, utilize . . . methods of administration . . . that have the effect of subjecting qualified handicapped persons to discrimination." 34 C.F.R. § 104.4(b)(4); See also 42 U.S.C. § 12182(b)(1)(D).

"must ensure that discrimination on the basis of handicap does not occur in connection with [education programs and activities that are not wholly operated by the recipient]." 34 C.F.R. § 104.43(b); 34 C.F.R. part 104, Appendix A, Subpart E, Section 30, p. 364 (1999).

This language is not discretionary.

The Ninth Circuit reached its unconscionable decision by ignoring decades of law defining the meaning of discrimination and the express intent of Congress. The

Ninth Circuit completely dismissed the language of Section 504 and the monumental importance placed upon ***each word*** of that statute for 52.6 million Americans.

Section 504 states:

> "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. § 794(a). (App. 54)

These words, and the 23 years of law interpreting them, cannot be subverted to the vague concept of "meaningful access." The phrase "meaningful access," as cited by the Ninth Circuit, applies only to the fraction of disability discrimination cases analyzing whether discrimination has occurred in the form of "disparate impact."[5] It has nothing to do with wheelchair access, except perhaps in the most common use of the phrase. Indeed, a person does not have "meaningful access" to a restroom if she cannot get to the toilet; she does not have "meaningful access" to her dormitory if she cannot get into the building to go to bed at night.

Federally funded programs, activities, benefits, and services must be "readily accessible" to persons who use

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[5] See *Hunsacker v. Contra Costa County*, 149 F.3d 1041 (9th Cir. 1998), and *Alexander v. Choate*, 469 U.S. 287, 83 L.Ed.2d 661, 105 S.Ct. 712 (1985).

wheelchairs. The phrase "readily accessible," as used throughout the ADA and Section 504's regulations, has had the same definition since 1978.[6]

> "A program or activity will be judged 'readily accessible' only if it is conducted in a building and a room that mobility impaired persons can enter and leave without assistance from others."

43 F.R. 36035, *supra*.

Congress not only approved this definition, Congress mandated the promulgation of 87 pages of detailed diagrams and measurements showing precisely how facilities must be altered or constructed to allow independent use by persons who use wheelchairs.[7]

At 42 U.S.C. § 12150, Congress explained: "[c]ompliance with the Uniform Federal Accessibility Standards [UFAS] . . . shall suffice to satisfy the requirement that facilities be readily accessible to and useable by persons with disabilities." This statement removes any doubt that the purpose of the UFAS and the parallel ADA regulations is to define what is required for readily accessible, independent access for persons with disabilities.

Like the phrase "readily accessible," other phrases ignored or misused by the Ninth Circuit have specific legal meanings. The Ninth Circuit ignored the long-established

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[6] Department of H.E.W., Office of Civil Rights, Policy Interpretation No. 4, 43 F.R. 36035 (August 14, 1978).

[7] *See e.g.* 42 U.S.C. §§ 12134, 12150; Uniform Federal Accessibility Standards, Appendix to 41 C.F.R. Ch. 101-19.6; and ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). *See generally*, 28 C.F.R. §§ 36.401-36.608 and Appendix A to part 36.

legal meaning of "program when viewed in its entirety." 34 C.F.R. § 104.22. (App. 57-58) This phrase simply allows recipients of Federal funds flexibility in *how* benefits and services are made readily accessible, *not whether* they are made readily accessible. 34 C.F.R. part 104, Appendix A, Subpart C, Section 20, p. 259 (1999).

Even under the Ninth Circuit's cavalier definition of that phrase, a college's program cannot be "readily accessible to and usable by individuals with disabilities" when the program, for days or weeks at a time, does not offer housing, restrooms, or transportation that a student who must use a wheelchair can enter.

In addition to the errors discussed above, the District Court and the Ninth Circuit Court of Appeals denied the relevance of a jury instruction taken directly from language expressly approved by Congress. The effect was to prevent the jury from understanding a critical component of the discrimination against Petitioner.

The jury instruction proffered by Petitioner at trial was taken directly from the regulations quoted below. The language of the regulations used in the jury instruction is printed in bold.

> The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 FR 36035 (August 14, 1978). ***Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying***

> ***an individual with a disability are formally instructed on the safest and least humiliating means of carrying.*** 'Manifestly exceptional' cases in which carrying would be permitted might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. ***Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.***

Appendix A to 28 C.F.R. § 35.101, *et seq.*, Subpart D, 35.150(b)(1). (App. 74-77)

The jury instruction also quoted the following language from the Federal Register, 43 F.R. 36035, cited above in the ADA Title II regulations:

> ***A program or activity will be judged 'readily accessible' only if it is conducted in a building and a room that mobility impaired persons can enter and leave without assistance from others. Carrying requires such assistance and is therefore unacceptable.***

In *Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir. 1995), the Court, citing *United States v. Board of Comm'rs of Sheffield, Alabama*, 435 U.S. 110, 134, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978), and *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 574-577, 97 S.Ct. 850, 51 L.Ed.2d 48 (1977), said:

> [B]ecause Congress mandated that the ADA regulations be patterned after section 504 coordination regulations, the former regulations have the force of law. When Congress re-enacts a statute and voices its approval of an administrative

> interpretation of that statute, that interpretation acquires the force of law and courts are bound by the regulation. The same is true when Congress agrees with an administrative interpretation of a statute which Congress is re-enacting. *Id.*, at 332.

Thus, the Ninth Circuit and the District Court had no discretion concerning delivery of the portion of the jury instruction taken directly from the regulations expressly approved by Congress. Such regulations have "the force of law and the courts are bound by the regulation." *Helen L., supra.*

The exclusion of this jury instruction is comparable to a State Court refusing to instruct the jury concerning the legal speed limit of a school zone, in an automobile accident case which took place in a school zone.

Congress did not intend for a federally funded college's duty to comply with the Uniform Federal Accessibility Standards to be subject to a judge's or a jury's decision of whether or not compliance may be reasonable. The fact that the ADA does not provide the option of having strong persons stationed at critical locations to carry individuals who use wheelchairs, was not a congressional oversight. Congress intended independent wheelchair access for persons with disabilities, with very few exceptions.

However, as precedent now stands in the United States' largest Circuit individuals who must use wheelchairs have no protection under Section 504 or the ADA as long as they are able to find someone to carry them.

Petitioner submits the Ninth Circuit's decision must be redressed by this Court.

## III. THE NINTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND EVERY FEDERAL COURT DECISION CONCERNING WHEELCHAIR ACCESS SINCE *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*

Language of the statutes and regulations quoted in this Petition originated with opinions from this Court. Twenty-three years ago in *Southeastern Community College v. Davis*, *supra,* this Court first articulated the exceptions to Section 504's anti-discrimination provisions. Southeastern Community College was only required to provide accommodations for a student with a disability that could be accomplished "without imposing undue financial and administrative burdens" or requiring "major adjustments" to the program.

From *Davis* forward, every Federal Court decision concerning wheelchair access has applied the "undue burden" standard. These cases include: *Keith v. Mullins*, 162 F.3d 539 (8th Cir. 1998) (county courthouse must provide wheelchair access); *Kinney v. Yerusalim*, 812 F. Supp. 547 (E.D. Pa. 1993), *aff'd,* 9 F.3d 1067 (3rd Cir. Pa. 1993), *cert. denied,* 511 U.S. 1033 (1994) (city and state officials required to install curb ramps or slopes – "discriminatory effects of architectural barriers" as an evil to be addressed); *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994) (city required to provide wheelchair access to City Commission meetings, city parks, and municipal court restrooms); *Putnam v. Oakland Unified School District*, 1995 U.S. Dist. LEXIS 22122 (N.D. Cal. 1998) (high school's failure to remove architectural barriers and failure to have accessibility plan was exclusion and discrimination in violation of Section 504); *Matthews v. Jefferson*, 29 F.Supp.2d 525 (W.D. Ark. 1998) (plaintiff

carried due to failure to provide wheelchair access to restrooms and second-floor courtrooms was violation of Title II and Section 504); *Layton v. Elder,* 143 F.3d 469 (8th Cir. 1998) (Eighth Circuit agreed failing to provide wheelchair access to second-story courtrooms was violation of Section 504 and Title II, reverses the District Court's denial of mandatory injunctive relief as a "clearly erroneous legal conclusion," and orders attorneys fees to plaintiff as prevailing party).

The same language of *Davis* also was adopted, almost verbatim, into Section 504's regulations by the Federal Administrative Departments, *i.e.*, an agency is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens." 28 C.F.R. § 39.150(a)(2).

In 1990, when Congress enacted the ADA, it specifically instructed the Attorney General to promulgate the regulations for Title II of the ADA (concerning " 'program accessibility, existing facilities', and 'communications' ") so that "such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b). These particular regulations were selected by Congress because they were drafted after the "judicial interpretations of *Davis* and its progeny."[8] Thus, the language of part 39 of title 28, unlike

[8] 28 C.F.R. part 39, Appendix A (citing *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981); and *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983)).

the regulations drafted before those judicial decisions, "reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts." *Id.*

The specific language adopted into Title II's regulation, at the direction of Congress, provides:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with 35.150(a) of this part would result in such alteration or burdens.

28 C.F.R. § 35.150(a)(3).

It is important to draw the Court's attention to the fact that the words "reasonable," "reasonable accommodation," or "reasonable modification" do not appear anywhere in this regulation or any other regulation or statute concerning structural access for students of federally funded colleges. Still, the Ninth Circuit cites 28 C.F.R. § 35.150 as its basis for stating that the college did not violate Section 504 because it provided "reasonable accommodations." The "reasonable accommodation" standard is from the branch of cases that evolved from *Davis* into employment law. Even in employment cases the "undue burden/hardship" analysis is required to determine whether an accommodation is reasonable. And the "reasonable modifications" standard only applies to policies, practices, and procedures – not architectural barriers.

In addition to the cases cited above, the Architectural and Transportation Barriers Compliance Board (ATBC Board) recently cited an interesting wheelchair access case, *Ramirez v. District of Columbia,* No. 99-803 (TFH)

(D.D.C. March 27, 2000). The ATBC Board cited *Ramirez* because the National Child Care Association (NCCA) asked the ATBC Board to add an exception to its regulations. The proposed exception would have allowed carrying children onto otherwise inaccessible child care play areas. The ATBC Board denied the requested exception. 65 F.R. 62499-62500. (App. 80-81)

Specifically, the Board said:

> "It has been a long standing interpretation of the civil rights laws for individuals with disabilities that carrying and lifting are ineffective and unacceptable methods for providing accessibility, and thus NCAA's request in this regard cannot be accepted." 65 Fed. Reg. 62499 (October 18, 2000) (citing 28 C.F.R. § 35.150(b)(1), and *Ramirez v. District of Columbia,* No. 99-803 (TFH) (D.D.C. March 27, 2000), 2000 U.S. Dist. LEXIS 4161.)

In *Ramirez, supra,* the District Court found:

> "[C]ertain necessary or unique facilities, such as bathrooms and auditoriums, must be accessible to avoid violating the rights of disabled students. . . . [T]he ability to use the toilet in private is essential." *Id.,* at 8. (quoting *Putnam v. Oakland Unified School District,* 1995 U.S. Dist. LEXIS 22122 (N.D. Cal. 1998)).
>
> "Because the private use of restrooms was available for nondisabled students, [plaintiff] was entitled to the same treatment. Because he was denied independent access to such facilities, while his unhindered classmates were not, [defendant's] practice had the effect of discriminating against him." *Ramirez,* at 12-13.

> "Assigning an aide to carry [plaintiff] to the restroom daily is an unacceptable method of compliance." *Id.* at 9 (citing 28 C.F.R. § 35.150(b)(1), *supra*).
>
> "[Defendant's] program . . . when viewed in its entirety, was not readily accessible to [plaintiff] because it did not provide a restroom for him to use independently." *Id.*, at 10.

All these cases, and the ATBC Board, demonstrate that the present case, *Bird v. Lewis & Clark College, et al.*, 303 F.3d 1015 (9th Cir. 2002), is an inexplicably one-of-a-kind decision. Still, it is more perplexing that the Ninth Circuit, in *Bird*, cites and then rules in conflict (without explanation) with another recent Ninth Circuit decision concerning wheelchair access. That case is *Barden v. City of Sacramento,* 292 F.3d 1073 (9th Cir. 2002).

The Court in *Barden,* like every Federal Court from 1981 until the present, recognized the "undue financial and administrative burdens" standard. *Id.*, at 1078, note 6. As in the prospective *Barden* trial, the Respondents in the present case had the opportunity at trial "to present evidence concerning any 'undue financial and administrative burdens.'" *Id.* Respondents offered no such evidence.

This Court's recent decision in *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) analyzed the construction of the anti-discrimination provisions of Title II. There is no question that the factual circumstances of the parties in *Olmstead* can be easily distinguished from the factual circumstances of the present case. Likewise, the standards this Court applied in *Olmstead* may be easily distinguished from the standards to be applied in the present case.

*Olmstead* involved a request for "reasonable modifications to policies, practices, and procedures" for individuals with disabilities, who sought placement in the communities rather than in state institutions. Thus, the standard to be applied was the "reasonable-modification" standard, patterned after "'part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act. *42 U.S.C. § 12134*(b).'" *Id.*, at 592 and 606.

The present case involves a federally funded college's prospective duty to make the benefits and services offered by its programs and activities readily accessible for students who must use wheelchairs. Thus, the standard to be applied is the "undue burden" standard, patterned after "part 39 of Title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b).

The ADA's regulations explain:

> Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include –
>
> (1) The nature and cost of the action needed under this part;
>
> (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
>
> (3) The geographic separateness, and the administrative or fiscal relationship of the site or

sites in question to any parent corporation or entity;

(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. § 36.104.

The "undue burden" standard is defined similarly to the "undue hardship" standard.[9]

As this Court explained in *Olmstead,* "the undue hardship inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a 'case-by-case analysis . . . '" *Olmstead*, at 606.

There has been no analysis, by the District Court or the Ninth Circuit, of whether selecting and providing wheelchair accessible locations for Petitioner would have caused an "undue burden" or "undue hardship," under the definitions provided by either the ADA or Section 504. The words "undue burden" do not even appear in the Ninth Circuit's opinion.

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[9] Compare 28 C.F.R. § 36.104 and 28 C.F.R. § 42.511(c) (1998) with 28 C.F.R. part 35, Appendix A, Section 35.150 (defining "undue burden").

Although the factual circumstances of *Olmstead* and the present case are easily distinguishable, the material fact of both cases – discrimination on the basis of disability – is identical. Congress intended the same protection for Petitioner Arwen Bird as it intended for the plaintiffs in *Olmstead*. This Court's opinion in *Olmstead* carefully determines and applies the intent of Congress. To that extent, the Ninth Circuit's opinion in the present case could not be more directly in conflict with this Court's decision in *Olmstead*.

In sum, when the Ninth Circuit refused to apply the "undue burden" standard to the facts of this case and approved the fact that Petitioner's untrained classmates had carried her on numerous occasions, its decision was in direct conflict with decisions of this Court and every other Federal Court, the administrative regulations of the Executive Branch, and the explicit intent of Congress.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| ARWEN BIRD,<br>*Plaintiff-Appellant*,<br>v.<br>LEWIS & CLARK COLLEGE;<br>THOMAS DARROW, PhD;<br>LARRY A. MEYERS,<br>*Defendants-Appellees.* | No. 00-35912<br>D.C. No.<br>CV-98-00691-ALA |
| ARWEN BIRD,<br>*Plaintiff-Appellee*,<br>v.<br>LEWIS & CLARK COLLEGE;<br>THOMAS DARROW, PhD;<br>LARRY A. MEYERS,<br>*Defendants-Appellants.* | No. 00-35944<br>D.C. No.<br>CV-98-00691-ALA<br>OPINION |

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
July 11, 2002 – Portland, Oregon

Filed September 3, 2002

Before: Alfred T. Goodwin, Thomas G. Nelson and
William A. Fletcher, Circuit Judges.

Opinion by Judge Goodwin

## COUNSEL

Elizabeth A. Carl, Portland, Oregon, for the plaintiff-appellant-appellee.

R. Daniel Lindahl, Bullivant, Houser, Bailey, Portland, Oregon, for the defendants-appellees-appellants.

## OPINION

GOODWIN, Circuit Judge:

Arwen Bird ("Bird") appeals the judgment in favor of Lewis & Clark College and a number of school administrators (collectively, "the College"). Bird alleges, among other claims, that the College discriminated against her on the basis of disability, in violation of the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794 et seq., and Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq. We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm for the following reasons.

### Background

#### A. Factual history

Bird was a student of the College when an automobile accident left her confined to a wheelchair. Upon learning of her injury, the College rebuilt parts of the campus to make it more wheelchair-accessible. It installed ramps at Bird's dormitory, changed its inside doors, and remodeled the bathrooms. It also reconfigured the biology labs where she worked.

In the fall of 1994, Bird applied for, and was accepted in, the College's Spring 1996 overseas program. The program was field-based and required participants to spend much of their time exploring the Australian continent. After accepting Bird into the program, the College approached Global Education Designs ("Global"), an Australian company making arrangements for the program, and inquired about the possibility of including a student in a wheelchair. Global indicated that the program could be revised to accommodate Bird.

In preparation for the trip, Bird met with Professor Thomas Darrow ("Darrow"), faculty director of the Australia program, and Larry Meyers ("Meyers"), director of the department of overseas programs. Bird described to them her needs for special living accommodations. She also discussed her medical condition, including the need for various antibiotics and anti-inflammatories. Finally, she mentioned some problems she might encounter in outdoor settings. As a result, Bird was informed that she could not participate in several activities due to her disability, but that alternative activities would be arranged.

Bird was otherwise assured that the program would be able to accommodate her disability. In an e-mail to Bird's parents, Darrow explained that Global and Meyers "commonly handle people both in the field and in home stays that are more physically challenged than [Bird]." Darrow further assured them that adequate facilities would be available in most of the outdoor trips.

Not every aspect of the program conformed to her requirements. At some 22 locations, Bird did not have full wheelchair access.

Bird's first set of complaints is related to her lodgings. In Sydney, Bird could not enter or leave her dormitory without assistance because of a steep curb to the sidewalk and a steep ramp. She also could not use the shower or the toilet unless someone assisted her. While staying at Jervis Bay, Bird needed assistance accessing the bathroom from her bedroom because the open ground between them was uneven and obstructed. The bathrooms in Canberra were not fully wheelchair-accessible, and she had to be carried up several stairs in order to reach the cafeteria. At Stradbroke Island, where Bird had been assured that the lodgings would be wheelchair-accessible, Bird found that access to her bedroom involved a stairway, and the doorway for the stalls in the bathroom was too narrow for her wheelchair. At the Coconut Beach Resort, she stayed at a lodging that was not wheelchair-accessible.

Bird also could not participate in a number of outdoor activities because of her disability. She could not join a tour exploring the tide pools at Jervis Bay, or complete a hike at Lamington Plateau. She skipped a three-hour morning boat tour of Stradbroke Island because she would have to use the bathroom during the tour. She did not hike at Carnarvon Gorge because it involved multiple stream crossings, and the group leader did not want Bird to jeopardize the safety of herself and others by participating. At Rubyvale, Bird could not go mining because the mine shaft involved a vertical drop.

Finally, Bird complains that transportation was not wheelchair-accessible, and that she had to be carried onto a bus heading from Jervis Bay to Canberra, and again from Brisbane to Lamington Plateau.

Although not every aspect of the program conformed to Bird's needs, the College offered evidence of having accommodated her disability. First, it provided Bird with alternative modes of transportation: it paid for her use of taxis in Sydney, and for her flight from Canberra to Brisbane while other class members used buses and trains. It arranged for a wheelchair-accessible van to transport her around Stradbroke Island.

The College also tried to satisfy Bird's unique living requirements. It paid two students enrolled in the program to be her helpers. It purchased a sleeping cot manufactured to her specifications, and a special shower head for her use. It provided a smaller, narrower wheelchair so that Bird could move indoors when door openings were too narrow for the normal wheelchair.

When Bird complained about her home stay in Brisbane, she was offered, but declined to accept, a different, more fully accessible house. At Jervis Bay, Coconut Beach, Gladstone, Heron Island, and Stradbroke Island, Bird was offered the use of one of two different rooms, one with the rest of the group but not wheelchair-accessible, the other in a separate area and more wheelchair-accessible. In Canberra and Sydney, Global reserved rooms on the ground floor for Bird.

Finally, the College, through its contractor Global, arranged a number of outdoor activities with Bird's disability in mind. At Lamington Plateau, Bird joined the study group working in an area close to a wheelchair-accessible path. She used a raft provided by Global so that she could float in the water and observe coral reefs at Heron Island. The class conducted a rainforest study at Lamington Plateau, based out of a more accessible site

than that normally chosen for the study. It also held a pictograph study at Carnarvon Gorge, using a trail that was wheelchair-accessible.

Bird otherwise participated in a number of class activities. She toured the Sydney Harbor, visited an archeological site near the Harbor, and was able to access the classrooms at the University of Sydney. Bird traveled to an aboriginal community at Jervis Bay, and went on excursions at Heron Island, Stradbroke Island, and Carnarvon Gorge National Park. Bird received one A, two C minuses and one D for the semester, and earned the full 16 credits toward her degree in biology.

## B. Procedural history

On May 12, 1998, Bird filed this action against the College, alleging: (1) violation of the Rehab Act, (2) violation of Title III of the ADA, (3) breach of contract, (4) breach of fiduciary duty, (5) defamation, (6) negligence, (7) fraud, (8) negligent misrepresentation, and (9) intentional infliction of emotional distress. All of the claims essentially share one premise: during Bird's stay in Australia, the College discriminated against her on the basis of disability by failing to provide her with wheelchair access.

Both parties moved for summary judgment. The district court granted judgment against Bird on her defamation and intentional infliction of emotional distress claims.

Two claims for equitable relief under the Rehab Act and Title III (collectively, "the Acts") were subsequently tried to the court. The remaining viable claims, including

Bird's claim for damages under the Rehab Act, were tried to the jury.

The jury found against Bird on all but the breach of fiduciary duty claim for which it awarded her $5,000. The district court subsequently denied Bird's claims for equitable relief under Title III and the Rehab Act. The district court also denied Bird's motion for a new trial, along with the College's motion for judgment as a matter of law on the breach of fiduciary duty claim. Both parties timely appealed.

**Discussion**

Bird contends that, because the failure to provide access in even one instance is disability discrimination under the Acts, the district court erred by denying: (1) her motion for summary judgment on the two claims; (2) equitable relief; and (3) her motion for a new trial. Although Bird appeals the denial of summary judgment, we decline to review the district court ruling after the jury has decided the case. *See De Saracho v. Custom Food Mach., Inc.,* 206 F.3d 874, 877-78 (9th Cir. 2000).

**I. Equitable relief**

**A. Standing**

Before we reach the merits of Bird's challenges, we must resolve the threshold issue of standing. In order to satisfy Article III's case or controversy requirement, Bird needs to show that she has suffered an injury in fact, that the injury is traceable to the challenged action of the College, and that the injury can be redressed by a favorable decision. *Cantrell v. City of Long Beach,* 241 F.3d 674,

679 (9th Cir. 2001). In the context of declaratory and injunctive relief, Bird must demonstrate that she has suffered or is threatened with a "concrete and particularized" legal harm, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), coupled with "a sufficient likelihood that [s]he will again be wronged in a similar way[.]" *City of Los Angeles v. Lyons,* 461 U.S. 95, 111 (1983).

Bird sought three equitable remedies in her complaint: (1) a declaration that the College discriminated against her on the basis of disability, in violation of Title III and the Rehab Act; (2) an order requiring the College to change its overseas programs to prevent future discrimination against disabled persons; and (3) an order enjoining the College from releasing her grades for the semester she participated in the Australia program. We hold that Bird has standing to seek only the last remedy.

Bird cannot demonstrate a real or immediate threat that the College will again subject her to discrimination. She has since graduated from the College, and has not alleged that she plans to return as a student or participate in the overseas programs. Accordingly, she lacks standing to seek a declaration that the College discriminated against her, or an order requiring the College to change its overseas programs.

However, Bird's less-than-average grades for some portions of the program's course work are sufficient to establish that her threat of injury was actual. Even though Bird has since graduated, her injury continues in the form of having received poor grades for the semester. Those grades remain in her transcript and can adversely affect her chances of employment and of admittance to graduate school. Second, there is a plausible causal

connection between her academic performance in the class and the alleged discrimination: for example, because she did not participate in some of the class activities, Bird might have missed information crucial to her performance in the class. Finally, an injunction would redress, at least in part, her injury by requiring the college not to release her semester grades. Accordingly, we conclude that Bird has standing to seek this last form of relief.

### B. The merits

We next consider the district court's decision to deny Bird equitable relief under the Acts. The ruling is reviewed for an abuse of discretion, and we will not reverse unless the court "fails to apply the correct law or . . . rests its decision on a clearly erroneous finding of material fact." *Levi Strauss & Co. v. Shilon,* 121 F.3d 1309, 1313 (9th Cir. 1997).

Section 504 of the Rehab Act prohibits discrimination against disabled individuals by entities receiving federal funding. It provides in part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a). In other words, the College must provide Bird with "meaningful access" to its programs. *Hunsaker v. Contra Costa County,* 149 F.3d 1041, 1043 (9th Cir. 1998). To that end, it may be required to make reasonable, but not fundamental or substantial, modifications to its programs. *See Alexander v. Choate,* 469 U.S.

287, 300 (1985). Reasonableness depends on the circumstances of each case, and requires a "fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Vinson v. Thomas,* 288 F.3d 1145, 1154 (9th Cir. 2002) (quoting *Wong v. Regents of the Univ. of Cal.,* 192 F.3d 807, 818 (9th Cir. 1999)).

Similarly, Title III of the ADA prohibits discrimination against the disabled in places of public accommodations. It provides in part:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations, of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Subsequent provisions of Title III define "discrimination" to include

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). Like the Rehab Act, Title III of the ADA requires public facilities to offer access to disabled persons by making "reasonable modifications" to their practices and policies. *See PGA Tour, Inc. v. Martin,* 532 U.S. 661, 682 (2001).

Contrary to her assertion, Bird does not prevail on the ADA or Rehab claim simply because the College failed to provide her with wheelchair access on a number of occasions. Compliance under the Acts does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, "'when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.'" *Barden v. City of Sacramento,* 292 F.3d 1073, 1075-76 (9th Cir. 2002) (quoting 28 C.F.R. § 35.150(a)).

The College has offered ample evidence of having accommodated Bird's disability. It hired two helpers; paid for her to fly while others took trains and buses; and paid for a cot, a second wheelchair, and a unique shower head built to her specifications. Almost everywhere the class stayed, Bird received alternative lodgings that were wheelchair-accessible. The College did not necessarily fail to make reasonable modifications simply because some aspects of the program did not conform to Bird's expectations.

In addition, evidence in the record indicates that Bird enjoyed many of the benefits offered by the program. In spite of her disability, Bird participated in outdoor activities with her classmates, attended classes, and received full credit for her semester abroad. As the district court noted in denying her equitable relief, the jury found that Bird was not "den[ied] . . . the benefits of the Australia program solely due to her disability[,]" and denied her damages under the Rehab Act. Because Bird's claim for relief is premised on a finding of disability discrimination, and because the jury verdict does not contain such a finding, and because the evidence does not compel such a

finding, the district court did not abuse its discretion in refusing to order a withholding of her grades.[1]

## II. Jury instructions

Bird contends that the district court erred when it refused to give the following requested instructions:

> The programs and activities of federally funded Colleges [sic], like Defendant Lewis and Clark College [sic], must assure that the programs and activities they offer are "readily accessible" to persons with disabilities. Such a program or activity will be considered "readily accessible" only if it is conducted in a building and room that mobility impaired persons, such as persons who must use wheelchairs, can enter and leave without assistance from others. Carrying requires such assistance and is therefore unacceptable.
>
> Carrying a person who has a disability may be humiliating because it dramatizes the person's dependency and creates a spectacle.
>
> Carrying a person instead of providing wheelchair access to a facility is contrary to the goal of providing accessible programs, which is to foster independence, and will be permitted only in manifestly exceptional circumstances, and only if: (1) all personnel who are permitted to participate in carrying the individual with a disability

[1] The College contends that Title III and the Rehab Act do not apply extraterritorially to regulate the administration of overseas programs. We do not reach this issue in light of our decision to affirm the district court's denial of equitable relief.

> are formally instructed on the safest and least humiliating means of carrying; and (2) the service must be provided in a reliable manner. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

"We review a district court's formulation of civil jury instructions for an abuse of discretion." *Abromson v. American Pac. Corp.*, 114 F.3d 898, 902 (9th Cir. 1997). However, if jury instructions are challenged as a misstatement of the law, they are reviewed de novo. *See Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998).

By describing in detail how carrying a disabled person is dehumanizing, at least parts of Bird's proposed instructions are argumentative and misleading. Denying that portion of the instructions was not error. *See, e.g., United States v. Hall*, 552 F.2d 273, 275 (9th Cir. 1977) (a court does not have to accept a proffered instruction that is "manifestly intended to influence the jury towards accepting the evidence of [one party] as against that of [the other]."). 

Nor was it reversible error to omit instructions that carrying a disabled person is an unacceptable method of providing access. Although based in part on federal regulations that disapprove of carrying, *see* 41 C.F.R. Pt. 35, App. A.,[2] the proposed instructions overall misstate the law.

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[2] 41 C.F.R. Pt. 35, App. A, provides in part: "[C]onsistent with long-standing interpretation of [the Rehab Act], carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility."

First, they imply that the College is required to make structural modifications to the buildings in Australia ("Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or chairlift."). Second, they unduly restrict accessible programs and activities to those conducted indoors ("[A] program or activity will be considered 'readily accessible' only if . . . conducted in a building and room that mobility impaired persons . . . can enter and leave without assistance from others."). Accessibility is not location-dependent; rather, as we have explained, the essential inquiry is whether the program overall is accessible through reasonable accommodations. *See* 28 C.F.R. § 35.150(a). The district court committed no error in rejecting the proffered instructions.

## III. Post-trial motions

Bird contends that the district court erred in denying her motion for a new trial or, alternatively, her motion to alter judgment, based on evidence that she was denied wheelchair access in violation of the Rehab Act. We review the denial of both motions for an abuse of discretion. *See Ruvalcaba v. City of Los Angeles,* 64 F.3d 1323, 1325 (9th Cir. 1995) (motion for a new trial); *Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir. 2001) (Rule 59(e) motion).

As an initial matter, we note that Bird did not object to the instructions given by the district court. Accordingly, we do not review the adequacy of the instructions that

were given. *See* Fed. R. Civ. Pro. 51;[3] *see also Hammer v. Gross,* 932 F.2d 842, 847 (9th Cir.) (plurality opinion) (en banc) (appellate review of unobjected-to instructions not available even in cases of plain error), *cert. denied,* 502 U.S. 980 (1991).

There was ample evidence to support the jury verdict. Because failure to provide wheelchair access does not automatically establish liability under the Rehab Act, the jury was not required to find against the College even though some aspects of the program were not fully wheelchair-accessible. The College countered Bird's evidence that she was denied access at 22 locations with evidence that it accommodated her disability on numerous occasions. That the jury found against Bird in spite of her claims of discrimination is not against the "clear weight of the evidence" and does not entitle her to a new trial. *Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir. 2002).

## IV. Motion to compel discovery

Bird assigns error to the district court's refusal to grant her discovery request for production of a journal written by the program director, Darrow. The district court correctly determined that entries starting on February 20, 1996 were prepared by Darrow in anticipation of litigation. There was no abuse of discretion in withholding

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[3] Federal Rule of Civil Procedure 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

discovery of that portion of the journal. *See Goehring v. Brophy,* 94 F.3d 1294, 1305 (9th Cir. 1996).

## V. Breach of fiduciary duty

The College contends in its cross-appeal that no reasonable jury could conclude from the evidence that Bird had a fiduciary relationship with the College under Oregon law. We disagree.

As a federal court exercising supplemental jurisdiction over state law claims, we are bound to apply the law of the forum state. *See Bass v. First Pacific Networks, Inc.,* 219 F.3d 1052, 1055 n.2 (9th Cir. 2000). Under Oregon law, no fiduciary duties are implied unless the parties are in a "special relationship." *Bennett v. Farmers Ins. Co. of Oregon,* 26 P.3d 785, 798 (Or. 2001). A special relationship arises when "one party has authorized the other to exercise independent judgment in his or her behalf" and, as a result, the party owing the fiduciary duty must take care of certain affairs belonging to the other. *Conway v. Pacific Univ.,* 924 P.2d 818, 824 (Or. 1996). What makes a relationship special is not its name, but the roles assumed by the parties. *See Strader v. Grange Mut. Ins. Co.,* 39 P.3d 903, 906 (Or. Ct. App. 2002).

Although the College contends that it owed no fiduciary duties to Bird, ample evidence exists in the record for the jury to make a contrary finding. The College assured Bird on a number of occasions that the overseas program would accommodate her disability. Darrow e-mailed Bird's parents and assured them that Global (the company handling the travel arrangements) and Meyers (the director of the College's overseas program) "commonly handle people both in the field and in home stays that are

more physically challenged than [Bird]." Darrow also indicated that adequate facilities would be available in most of the outdoor trips.

Bird also had reason to trust Darrow's assurances. Shortly after her injury, the College worked closely with Bird to ensure that she could navigate comfortably around campus. It installed ramps at her dormitory, changed its inside doors, and remodeled its bathrooms to make them wheelchair-accessible. It even rebuilt parts of the biology labs where she worked. Based on these facts, the jury could have concluded that a "special relationship" developed between the parties. There was no error in allowing that question to go to the jury.

**AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | |
|---|---|
| ARWEN BIRD<br>Plaintiff,<br>vs.<br>LEWIS & CLARK COLLEGE, THOMAS DARROW, Ph.D., and LARRY A. MYERS,<br>Defendants. | Civil No. 98-691-AA<br>OPINION AND ORDER<br>(Filed May 24, 2000) |

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AIKEN, Judge:

Plaintiff, Arwen Bird, filed nine claims against the defendants. They were: violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehab Act"), violation of the Americans with Disabilities Act of 1990, 42

U.S.C. §§ 12101, 12181-12189, 12203 ("ADA"), breach of contract, breach of fiduciary duty, defamation, negligence, fraud, negligent misrepresentation, and intentional infliction of emotional distress. Defendants moved for summary judgment on the following four claims: violation of the Rehab Act, violation of the ADA, defamation, and intentional infliction of emotional distress. Defendants also moved for partial summary judgment on the negligence claim. The motion was granted as to plaintiff's claims for defamation and intentional infliction of emotional distress, and denied as to all other claims.

The defendants now bring a second motion for summary judgment against all of plaintiff's remaining claims for relief. That motion is denied.

Plaintiff files a cross-motion for summary judgment on all claims for liability. That motion is also denied.

## Factual Background

As a student at Lewis and Clark College ("the college"), plaintiff, a paraplegic, participated in an overseas program to Australia. The program was administered by the college during the spring of 1996. Plaintiff alleges that during her stay in Australia, defendants failed to reasonably accommodate her disability thus resulting in violations of two federal laws, and Oregon state laws that govern claims of tortious conduct. Plaintiff alleges, among other claims, that she was subjected to unsafe toilets, forced catheterization, made to use unsanitary medical supplies, and denied participation in many class activities due to her disability.

Plaintiff is a citizen of the United States and a resident of Oregon. The college is an Oregon nonprofit corporation with its primary place of business in Portland, Oregon. Both named defendants were employed by the college and acting within the course and scope of their employment during the relevant time period. The defendants' conduct giving rise to this lawsuit occurred outside the United States in Australia.

## Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should

be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical,* 809 F.2d at 630.

## Discussion

### I. Violation of the Rehab Act and the ADA

Plaintiff has alleged violations of Title III of the ADA and violations of the Rehab Act based on defendants' alleged failure to accommodate her needs and due to discriminatory acts while she was in Australia.

As a recipient of Federal financial assistance, there is no dispute that the college must comply with both the Rehab Act and the ADA.

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a public accommodation.

42 U.S.C. § 12182(a). The Rehab Act, upon which the ADA is modeled, similarly provides:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. § 794(a).

Because both of these statutes apply to federally funded educational institutions, courts frequently analyze discrimination claims under these statutes under the same rubric.

To prevail on a claim under the Rehab Act, plaintiff must prove that: (1) she is disabled as defined by the Act; (2) she is otherwise qualified for the position sought; (3) she has been excluded from the position solely because of her disability; and (4) the position exists as part of the program or activity receiving federal financial assistance. *Knapp v. Northwestern University*, 101 F.3d 473, 478 (7th Cir. 1996).

Similarly, to prevail on her claim under Title III of the ADA, plaintiff must show: (1) that she is disabled within the meaning of the Act; (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation; (3) that the defendant took adverse action against the plaintiff that was based on the plaintiff's accessibility; and (4) that the defendant failed to make reasonable modification that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation. *Amir v. St. Louis University*, 184 F.3d 1017, 1027 (8th Cir. 1999).

The ADA specifically finds discrimination to include:

> A failure to make reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii).

The regulations implementing the Rehab Act also require an educational institution that accepts federal funds to make such modifications to its academic requirements as are necessary to ensure that such requirements do not "have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." 34 C.F.R. § 104.44.

Defendants argue that the Australia overseas program provided by the college, when taken in its entirety, accommodated the plaintiff and enabled her to participate in the program. The defendants further argue that they were not required to give the plaintiff the accommodation of her choice, but that the accommodation offered must have been reasonable. Lastly, the defendants argue that the college's concern for student safety is permitted under the statute, and that concern is a valid basis to shape any accommodations.

The defendants contend that this court should find, as a matter of law, that the Australia overseas program afforded the plaintiff an "equal opportunity to achieve equal results." *See* 34 C.F.R. Pt. 104, App. A, Subsection 6. Specifically, the defendants argue that the "undisputed evidence" demonstrates that the defendants reasonably accommodated plaintiffs' disability during the Australia program. *See* Defendants' Memo in Support of Summary Judgment, p. 19. Plaintiff responds that "[d]efendants' motion is entirely dependent upon a rendition of the facts that is so far from the truth that it would be humorous if the circumstances and conditions plaintiff faced in Australia had not become so serious." Plaintiffs' Response, p. 7.

Defendants allege, as an example of reasonable accommodation, that while at Lamington Plateau, plaintiff

was given "the first choice of campsites near an accessible restroom in order to enable her to assess the terrain and choose which location was most accessible for her." Defendants' Memo in Support, p. 11. Plaintiff disputes defendants' alleged accommodation and argues that it was not an accommodation at all. Instead, plaintiff contends "that the restroom at Lamington was not wheelchair accessible from any campsite – it was down a gravel hill from all of the campsites." Plaintiff's Response, p. 8.

The defendants argue that the college hired two students as "caregivers" to plaintiff in order to "assist her with her personal needs." Defendants' Memo in Support, p. 9. Dale Holloway, the coordinator of Student Support Services at the college, testified that the two students were assigned to plaintiff specifically because it was anticipated that plaintiff would encounter situations where restroom facilities were not accessible to her. Holloway dep., p. 31.

Plaintiff contends that these two students were participants in the overseas program who paid tuition just like the other students. They were paid a small amount per hour for the time they spent assisting plaintiff, averaging approximately one hour per day. Pl. Aff. ¶ 10, 11, Ex. 4. They had no training and were given no instructions other than to "help" plaintiff.

The parties dispute the job parameters, roles, and appropriate tasks which were to be assumed by these two student "helpers." Defendants contend that it was reasonable to have the student helpers carry plaintiff into allegedly inaccessible toilets, obstructed shower stalls, inaccessible buses, and up stairs into inaccessible classrooms. Ex. 5; Pl Aff. ¶ 11, 22, 24; Ex. 6, Day 36. Plaintiff responds that it

was never her understanding or expectation that her two helpers would be providing her with accessibility by carrying her. Instead, plaintiff testified that she understood the role of the student helpers to be providing assistance such as carrying her bags, assisting in camping chores such as pitching her tent, and doing her laundry.

Plaintiff, in fact, controverts and disagrees with every one of defendants' listed "accommodations" regarding not only the specific terms of each accommodation, but also asserting that some of the listed items do not even qualify as accommodations. *See* Plaintiff's Response, p. 8-12 (and accompanying references to record citations). After reviewing the voluminous exhibits attached in support of both parties' summary judgment motions, including conflicting deposition testimony, the court cannot rule, as a matter of law, that defendants either did or did not accommodate the plaintiff in accordance with applicable law. The record is replete with factual disputes about the events that transpired over the fifteen week period, and the extent and nature of the accommodations offered plaintiff during her stay in Australia.

Defendants' summary judgment motion on plaintiff's Rehab Act and ADA claims is denied. Plaintiff's motion for summary judgment as to liability only on these claims is also denied.

## II. Breach of Contract

Plaintiff characterizes her contract with the defendants as one where she was to "pay tuition, expenses and fees," and the college "was to provide the Program, including accommodations made reasonable and necessary by plaintiff's disability." Second Amended Complaint, ¶ 61.

"[T]he basic legal relation between a student and private university or College is contractual in nature. The catalogs, bulletins, circulars, and regulations of the institution made available to the matriculant became a part of the contract." *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992) (internal quotation omitted).

> To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor. [For example, where a defendant university took tuition money and provided no education, or alternatively, promised a set number of hours of instruction and then failed to deliver; or when a professor declined to give lectures and final exam, and all students received a grade of "B," internal citations omitted]. The essence of plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but that . . . it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform its promise.

*Id.*

The *Ross* case involved an extremely gifted, highly recruited basketball player who was "academically disadvantaged." *Id.* at 411. The Seventh Circuit reversed the trial court's dismissal of Ross' breach of contract claim, holding:

> We read Mr. Ross' complaint to allege more than a failure of the University to provide him with an

> education of a certain quality. Rather, he alleges that the University knew that he was not qualified academically to participate in its curriculum. Nevertheless, it made a specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him.

*Id.* at 417. *Ross* involved a specific student with individual needs; defendant university understood those needs and agreed it would "provide specific services." Similarly, defendants here were dealing with a specific student with individual needs. As in *Ross*, after a period of negotiations, the parties came to a specific, individualized agreement. That agreement involved the defendants' provision of certain services or accommodations allowing the plaintiff to participate fully in the overseas program. As noted above, there is rampant disagreement and dispute about what exactly those accommodations were and whether they were reasonably adequate.

The court finds many material issues of disputed fact, therefore, defendants' and plaintiff's summary judgment motions on this claim are denied.

III. Breach of Fiduciary Duty

Under Oregon law, a fiduciary duty exists

> where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence.

*Bennett v. Farmers Ins. Co. of Oregon,* 150 Or.App. 63, 80, 945 P.2d 595 (1997) (internal quotation omitted).

The parties agree that Oregon courts have not addressed the issue of whether an academic institution acts as a fiduciary or occupies a position of trust and confidence in relation to its students. However, to the extent that plaintiff alleges that she "reposed a special confidence" in defendants because of her disabled status and the fact that the program took place in a foreign country, the defendants argue that the "undisputed evidence" shows that defendants did not breach a duty. Specifically, defendants argue that they did, in fact, accommodate plaintiff's disability.

As quoted above, a fiduciary duty exists where "there has been a special confidence reposed." *Id.* at 80. Further, in *Starkweather v. Shaffer,* 262 Or. 198, 497 P.2d 358 (1972), the court held that "a fiduciary duty exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence."

The plaintiff alleges that when she returned from her automobile accident onto the campus, she noted some accessibility problems that she encountered on the campus. In response, the plaintiff alleges and the defendants acknowledge, these problems were promptly resolved. Plaintiff alleges that this conduct by the defendants continued, and as a result, a relationship began to develop over the following years. Plaintiff argues that the result was that she reposed growing trust and confidence in defendants. Ultimately, plaintiff asserts that the defendants represented to her that they would take care of her situation overseas and attempt to meet her special needs. Plaintiff alleges that those needs were discussed and specified over the year prior to the start of the trip. Plaintiff

argues that when the defendants said they understood her needs and would strive to meet them, they were dealing with an individual plaintiff who trusted and reposed a "special confidence" in them.

I find that the allegations contained in plaintiff's amended complaint, as well as the extensive record before this court, are sufficient to state a claim for breach of fiduciary duty. Further, I find there exists disputed issues of material fact as to the substance of the claim. Defendants' and plaintiff's summary judgment motions on this claim are denied.

IV. Negligence

The parties agree on the law that applies to plaintiff's claim of negligence, specifically that the general foreseeability standard of *Fazzolari v. Portland School District No. 1J,* 303 Or. 1, 734 P.2d 1326 (1987), is the appropriate standard to apply. Under that standard, the plaintiff is required to allege facts from which a factfinder could determine: (1) that defendants' conduct caused a foreseeable risk of harm; (2) that the risk is to an interest of a kind that the law protects against negligent invasion; (3) that defendants' conduct was unreasonable in light of the risk; (4) that the conduct was a cause of plaintiff's harm; and (5) that plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendants' conduct negligent. *Slogowski v. Lynes*, 324 Or. 436, 441, 927 P.2d 587 (1996) (internal quotation omitted).

Defendants then argue questions of disputed fact in support of their motion for summary judgment. Defendants assert that their conduct did not create a foreseeable

risk of harm to plaintiff "because defendants did everything in their power to accommodate plaintiff's disability." Defendants' Memo, p. 24. Defendants argue that "it was only plaintiff's personal desire that the accommodations be such as to allow her complete independence in her personal care." *Id.* Plaintiff asserts that not only did the defendants fail to accommodate her but that she suffered discrimination and was put in situations that compromised her physical safety by the following: inaccessible toilets, bathing areas, sleeping areas, eating facilities, libraries, housing, areas used by the students to study, and the GED facilities when she needed to seek medical attention.

Plaintiff also moves for summary judgment on this claim arguing that "clearly defendants negligently caused harm to plaintiff's protected interests. The only question for the jury should be the amount of damages." Plaintiff's Response, p. 31.

Defendants' motion for summary judgment and plaintiff's motion for summary judgment as to liability are denied. The court finds extensive questions of disputed fact prohibiting any ruling "as a matter of law" as to whether the defendants were negligent.

V. Fraud and Negligent Misrepresentation

In order to prevail on her fraud claim, plaintiff must prove the following:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance

> of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

*Johnson v. Jeppe*, 73 Or. App. 430, 438, 698 P.2d 1020 (1985) (internal quotation omitted).

The tort of negligent misrepresentation requires that one party in a relationship owe a duty "beyond the common law duty to exercise reasonable care to prevent foreseeable harm" to the other party. *Conway v. Pacific University*, 324 Or. 231, 236, 924 P.2d 818 (1996). "In other words, for the duty to avoid making negligent misrepresentations to arise, the parties must be in a 'special relationship,' in which the party sought to be held liable had some obligations to pursue the interests of the other party." *Id.*

Plaintiff relies on at least one material nondisclosure in support of her claims for fraud and negligent misrepresentation.

Plaintiff alleges that the defendants failed to disclose to her "GED's inexperience and lack of knowledge concerning persons who are paralyzed from the waist down and must use a wheelchair." Second Amended Complaint, para. 91. GED was retained by the college as their agent to operate the overseas program in Australia.

Plaintiff alleges that there were conflicting communications between the defendants and her concerning whether or not GED had prior experience with persons with disabilities. The plaintiff alleges that defendant Darrow assured plaintiff's parents that GED had prior experience with persons more physically challenged than the plaintiff, when in fact, the record now

supports the fact that GED had no prior experience with persons with disabilities such as plaintiff's.

Further, plaintiff alleges that she and her mother discussed plaintiff's special needs in an ongoing dialogue with defendants and their representative from GED prior to the start of the program. Plaintiff alleges that she was reassured by defendants and their representatives in Australia that they were aware of her special needs. Plaintiff alleges that she and/or her mother discussed with the defendants restroom facilities, access to dormitories and classrooms, access to buildings that had steps, as well as access to specific educational experiences which were part of the program.

Plaintiff alleges that the defendants knew she was relying on them and had placed her confidence in their judgment. Plaintiff alleges that her reliance was based, in part, upon the defendants' actions and response upon her return to campus after her injury, whereby the defendants actually accommodated her special needs in many instances. Therefore, based on the defendants' past behavior and their (alleged) current expressions of understanding of her needs and representations that they knew the sites and locations at issue, plaintiff relied on them and placed confidence in their judgment.

I find there exists disputed issues of material fact surrounding these claims and preventing the entry of summary judgment for either party. Therefore, defendants' and plaintiff's summary judgment motions are denied.

VI. Defendant Larry Meyers

Meyers was the Director of the Overseas/Off Campus Programs for the college. Defendants argue that he should be dismissed from this lawsuit as he was not personally liable for conduct that occurred in Australia.

The plaintiff alleges that Meyers was an integral part of the pre-trip activity, including the planning that occurred for plaintiff's participation in the Australia program. The plaintiff asserts that as the person in charge, Meyers' failure to adequately plan for plaintiff's safe participation in the program led to the problems experienced by plaintiff, and eventually to this lawsuit.

Defendant's motion to dismiss Meyers from this lawsuit is denied. Plaintiff's allegation that Meyers was involved with and ultimately the person responsible for the planning and preparation of the Australia trip renders him an appropriately named defendant in this lawsuit. *See* Plaintiff's Response, p. 48-49 (plaintiff's allegations of specific acts and omissions by Meyers).

Conclusion

Defendants' supplemental motion for summary judgment (doc. # 86) is DENIED. Plaintiff's cross-motion for summary judgment as to liability (doc. # 95) is denied.

Further, the parties requests for oral argument are denied. IT IS SO ORDERED.

Dated this 24 day of May 2000.

/s/ Ann Aiken
Ann Aiken
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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|---|---|
| ARWEN BIRD<br>Plaintiff,<br>vs.<br>LEWIS & CLARK COLLEGE, THOMAS DARROW, Ph.D., and LARRY A. MYERS,<br>Defendants. | Civil No. 98-691-AA<br>OPINION AND ORDER<br>(Filed Oct. 13, 1999) |

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AIKEN, Judge:

Plaintiff, Arwen Bird, filed nine claims against the defendants. They were: violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehab Act"), violation of the Americans with Disabilities Act of 1990, 42

U.S.C. §§ 12101, 12181-12189, 12203 ("ADA"), breach of contract, breach of fiduciary duty, defamation, negligence, fraud, negligent misrepresentation, and intentional infliction of emotional distress ("IIED"). Defendants moved for summary judgment on the following four claims: violation of the Rehab Act, violation of the ADA, defamation, and intentional infliction of emotional distress. Defendants also moved for partial summary judgment on the negligence claim. For the reasons set forth below the motion was granted as to plaintiff's claims for defamation and intentional infliction of emotional distress, and denied as to all other claims.

## Factual Background

As a student at Lewis and Clark College ("the college"), plaintiff, a paraplegic, participated in an overseas program to Australia. The program was administered by the college during the spring of 1996. Plaintiff alleges that during her stay in Australia, defendants failed to reasonably accommodate her disability thus resulting in violations of two federal laws, and Oregon state laws that govern claims of tortious conduct. Plaintiff alleges, among other claims, that she was subjected to unsafe toilets, forced catheterization, made to use unsanitary medical supplies, and denied participation in many class activities due to her disability.

Plaintiff is a citizen of the United States and a resident of Oregon. The college is an Oregon nonprofit corporation with its primary place of business in Portland, Oregon. Both named defendants were employed by the college and acting within the course and scope of their employment during the relevant time period. The defendants' conduct

giving rise to this lawsuit occurred outside the United States in Australia. Plaintiff asserts that federal and state law applies in this case while defendants assert that United States law may not be applied extraterritorially. Specifically, defendants assert that plaintiff's claims for violations of the Rehab Act and the ADA, and part of her negligence claim, should not survive this motion as those claims are premised on violations of United States law.

Plaintiff further alleges that a letter written by defendant Myers in response to a letter from her attorney contained defamatory statements. Plaintiff does not allege, however that this letter has been sent outside the college.

Finally, plaintiff alleges that defendants' conduct during her semester in Australia has caused her severe emotional distress for which she is entitled to redress.

## Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v.*

*Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical,* 809 F.2d at 630.

## Discussion

### I. Violation of the Rehab Act and the ADA

Plaintiff has alleged violations of Title III of the Rehab Act and violations of the ADA based on defendants' alleged failure to accommodate her needs and due to discriminatory acts while she was in Australia. Rather than addressing these claims on the merits, defendants' argue that they are entitled to summary judgment based on the presumption against extraterritorial application of United States laws.

The court first notes that several exceptions exist to the presumption against extraterritoriality, and a number of statutes covering a variety of subjects are routinely applied extraterritorially.[1] Also of note is defendants'

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[1] *See, e.g., Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (extraterritorial application of the Jones Act); *Steele v. Bulova Watch*

(Continued on following page)

failure to provide an alternative for the plaintiff: if, as defendants contend, the United States laws do not apply and assuming plaintiff may be entitled to redress, in what country and under whose laws is she entitled to relief? Defendants have also failed to provide sufficient evidence to demonstrate that the Rehab Act and the ADA cannot be enforced against a recipient of federal funds for actions occurring outside the United States.

Further, the extensive contacts that existed between the college's overseas program, its faculty and students, and the United States are sufficient to establish jurisdiction over the defendants while in Australia and thus subject them to United States law. Also, the fact that the plaintiff and all the defendants are citizens of the United States, and that defendant college is an American corporation doing business in the United States, make the choice of law decision straightforward.

Jurisdiction to prescribe law is proper with respect to conduct that occurs outside the United States when the conduct has substantial effect within the United States or, more generally, to prescribe law with respect to the activities, interests, status or relations of its nationals outside or inside the United States. *See* The Restatement (Third)

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*Co.*, 344 U.S. 280 (1952) (Lanham Act applies extraterritorially); *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) (federal statute that punished violent crimes committed in aid of racketeering applied extraterritorially); *United States v. Harvey*, 2 F. 3d 1318 (3rd Cir. 1993) (extraterritorial application of Protection of Children Against Sexual Exploitation Act); *United States v. Kaercher*, 720 F.2d 5 (1st Cir. 1983) (extraterritorial application of federal statute prohibiting possession of drugs on board a vessel/aircraft with departure/arrival into United States).

of Foreign Relations Law §§ 402(1)(c), (2) (1999). Section 403 advocates a reasonableness test for the exercise of extraterritorial jurisdiction, and lists a number of factors that are relevant to this test. Under § 403(2)(b), nationality, residence, and economic activity are important considerations in imposing jurisdiction.

Considering the facts of the case at bar, I conclude that defendants' conduct in Australia may have a significant effect on plaintiff or other students once they have returned to the United States. Extraterritorial jurisdiction may be appropriate under the "objective territorial principle" in situations where actions occurring outside the United States produce detrimental effects within the United States. *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994). Further, the fact that all parties are citizens and entities of the United States whose conduct is subject to United States law makes it unlikely that the exercise of jurisdiction would be found unreasonable. *See McKeal v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (state may punish the wrongful conduct of its citizens no matter where such conduct takes place). The application of United States law was considered reasonable in an action for damages where plaintiff's injury occurred at a foreign resort, but American contacts were substantial in that plaintiff was an American citizen, had been hired in the United States, and one of the defendants was a United States corporation. *See Neely v. Club Med Management Services*, 63 F.3d 166, 185 (3rd Cir. 1995). Relying on choice-of-law analysis, the state with the most significant relationship to the parties and the most connection to the events of the case is Oregon, and since neither party has raised the substantive law of any jurisdiction besides the United States and Oregon, I will

apply the laws of the United States and Oregon in this case.

There are analogies in case law to be made. I look to *Lamont v. Schultz*, 748 F.Supp. 1043 (S.D.N.Y. 1990), which decided whether the Establishment Clause of the First Amendment and its prohibition against expenditure of public funds on religious education would apply to the operation of religious schools abroad under the American Schools and Hospitals Abroad (ASHA) Program. *Id.* Even though the activities of the ASHA-funded schools took place entirely overseas, the court concluded that the Establishment Clause applied based on the significant involvement of American institutions in the process of implementing the various activities, including the fact that significant numbers of faculty and staff must be United States citizens. *Id.* at 1052.

The situation in *Lamont* is not unlike the responsibilities of an American university that accepts federal funds in exchange for guarantees to the federal government that disabled students will not suffer discrimination at the hands of the university. The funds that the defendant college accepted in the case at bar from the federal government can not be separated from the funds utilized for the overseas program in Australia. The ongoing requirement of adherence to the Rehab Act and the ADA did not evaporate when Lewis and Clark College faculty accompanied Lewis and Clark College students on a Lewis and Clark College sponsored program overseas.

A further analogy can be made to statutes enacted pursuant to congressional authority under the Spending Clause versus the Commerce Clause. The nature of defendant college's responsibilities under Section 504 of the

Rehab Act are significantly different than those imposed on an employer under Title VII of the Civil Rights Act. The Spending Clause, under which Section 504 was enacted, is used by the federal government to keep schools from discriminating against disabled students through the threat of withdrawal of taxpayer funds. Title VII, enacted under the Commerce Clause, has no such provision and is therefore less relevant to the case at hand and less persuasive as an analogous statute. By extension the cases brought under Title VII that are relied upon by defendants, including *EEOC v. Arabian American Oil Co.*, 49 U.S. 244 (1991) and *Arno v. Club Med, Inc.*, 22 F.3d 1464 (9th Cir. 1994), are not persuasive. A more accurate analogy is found between Title VI or Title IX and Section 504, based on the fact that all three statutes were enacted under the Spending Clause, and condition the acceptance of federal funds on a promise that the recipient will not discriminate in what the Supreme Court has described as "essentially a contract." *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989, 1997 (1998). As the Supreme Court explained in *Gebser*, statutes enacted under the Spending Clause have a contractual framework and are geared towards *protecting* individuals from discriminatory practices rather than merely prohibiting discriminatory conduct as Title VII does. *Id.*

Finally, the extension of United States jurisdiction to an American university's overseas program for American students is similar to extending United States jurisdiction over Americans in stateless vessels on the high seas. If defendants' "presumption against extraterritoriality" argument is accepted to preclude United States jurisdiction, students on overseas programs would become the proverbial "floating sanctuaries from authority," not unlike

stateless vessels on the high seas. A stateless vessel may be subject to United States jurisdiction where defendants are all citizens or resident aliens of the United States. *United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995). Just as the presumption against extraterritoriality may not always apply on the high seas, it may not apply in specific situations where accepting the presumption would lead to unreasonable results or leave a plaintiff with no forum for her grievances.

For all the aforementioned reasons, I find that defendants have failed to offer sufficient evidence that federal laws should hold no force over defendants' conduct in Australia. Summary judgment on plaintiff's Rehab Act and ADA claims is denied.

II. Negligence

The aspects of plaintiff's negligence claim that are premised on duties imposed by the Rehab Act, the ADA or Oregon law are the subject of this motion. Defendants argue that they are entitled to summary judgment on those aspects of this claim based on the presumption against extraterritorial application of statutes. For the reasons set forth above, the presumption does not apply in this case, and plaintiff's negligence claim will be evaluated under United States law. Defendants did not present any arguments attacking the sufficiency of the evidence offered by plaintiff on this claim. Summary judgment is, therefore, denied.

III. Defamation

Plaintiff's defamation claim is based on a letter signed by defendant Meyers on April 2, 1997, to Mr.

Rosenthal, an attorney for the plaintiff. Mr. Rosenthal's letter mentioned the possibility of litigation on his client's behalf, and Mr. Meyers response may be considered pre-litigation correspondence. Mr. Meyers co-authored the letter with Charles Hinkle, an attorney for the college. The letter in question is being kept at the college and no evidence has been submitted that the letter or copies of the letter have left the campus.

To establish a claim for defamation, a plaintiff must show that the defendant made a defamatory statement about the plaintiff, and that the defamatory statement was published or communicated to a third person. *Wallulis v. Dymowski*, 323 Or. 337, 342-43, 918 P.2d 755 (1996) (internal citations omitted). Also essential to the tort of defamation is injury to plaintiff's reputation caused by communication of the defamatory statement to someone other than to plaintiff. *Shirley v. Freunscht*, 303 Or. 234, 238, 735 P.3d 600 (1987).

Applied to the facts of this case, plaintiff has offered no proof that the letter written by Mr. Meyers has been published to anyone not involved in this proceeding. Generally a statement is "published" for the purposes of a defamation claim when it is communicated to a third party. *Wallulis*, 323 Or. at 343. Here, plaintiff has expressed her *concern* that the letter will be published to colleges to which she intends to make application in the future. *See* Pl's Opposition Brief at 16. Summary judgment on a claim for libel is appropriate where there is no evidence that defendants intentionally or negligently communicated the contents of the document in question to a third party. *Morrow v. II Morrow, Inc.*, 139 Or.App. 212, 219-20, 911 P.2d 964 (1996). With no injury to complain of at this point, plaintiff's defamation claim is hypothetical.

Assuming, *arguendo*, that the letter in question had been published to a third party and met the other requirements, as a communication transmitted in preparation for litigation, the letter still would be subject to the absolute privilege available to communications in the judicial framework. *Bob Godfrey Pontiac v. Roloff*, 291 Or. 318, 334-35, 630 P.2d 840, 850 (1981) (party litigants and their attorneys have an absolute privilege against defamation for statements made in the context of judicial proceedings). Where such a privilege exists plaintiff's defamation claim is barred as a result. *Wallulis*, 323 Or. at 347-48. For both the reasons stated above, the defendants' motion for summary judgment on this claim is granted.

IV. Intentional Infliction of Emotional Distress (IIED)

Plaintiff alleges that defendant Darrow and others exhibited conduct that was cruel and indifferent, that they were hostile toward her for her requests for accommodations, that they failed to help her obtain medical attention, and that their treatment of her amounted to intolerable and outrageous conduct.

A claim for IIED requires pleading and proof that: (1) defendant intended to inflict severe emotional distress on plaintiff; (2) defendant's conduct did, in fact, cause plaintiff to suffer severe emotional distress; and (3) defendant's conduct involved some extraordinary transgression of the bounds of socially tolerable conduct. *Madani v. Kendall Ford*, 312 Or. 198, 203, 818 P.2d 930, 933 (1991). To withstand a motion for summary judgment on an IIED claim, a plaintiff must offer some evidence that defendant's conduct reaches the third part of the test and would constitute socially intolerable conduct. *Phillips v. Lincoln*

*County Sch. Dist.*, No. 97-1095, 1999 WL 460766 at *3 (Or. App. July 7, 1999).

In order to determine whether conduct is socially intolerable, a fact-specific inquiry must be conducted, and the alleged conduct must be reviewed on a case-by-case basis, including consideration of the totality of the circumstances involved. *Lathrope-Olson v. Oregon Dep's of Transp.*, 128 Or.App. 405, 408, 876 P.2d 345, 346 (1994). Plaintiff has failed to offer evidence that conclusively shows that defendants *intended* to cause her distress by failing to sufficiently accommodate her needs, or that their actions were sufficiently egregious to be considered socially intolerable.

Two circumstances of the overseas program warrant attention. First, by their nature, overseas programs often involve a few adults having responsibility for the health, safety and wellbeing of a large group of young people. Plaintiff's unique situation placed increased responsibility on the adults in this case, and while they may have treated her with indifference at times or failed to respond to her requests as quickly as might have been ideal, their oversights do not rise to a level of socially intolerable conduct. *Turnbow v. K.E. Enterprises*, 155 Or.App. 59, 65, 962 P.2d 764, 768 (1998). Second, defendants' acts, beginning in the United States and continuing throughout the period of time spent in Australia, were not ones of intentional cruelty or hostility toward plaintiff. Defendants' efforts may have been unsuccessful and plaintiff may have been uncomfortable or even suffered some as a result, but that does not mean that defendants intentionally caused plaintiff emotional harm.

Finally, plaintiff alleges that defendants made statements to the effect that she should be permanently catheterized to avoid the difficulty of finding accessible toilets for her, and similar statements that she found cruel and hurtful. While these statements may have been insensitive and rude, they do not establish an intent to inflict emotional distress. *Lathrope-Olson*, 120 Or.App. at 408, 876 P.2d at 346. The tort of IIED does not provide recovery for the kind of annoyance or injured feelings that may result from friction and rudeness among people in day-to-day life. *Hetfeld v. Bostwick*, 136 Or. App. 305, 308, 901 P.2d 986, 987 (1995). Plaintiff's failure to provide evidence of overt acts of cruelty and malice make it unlikely a jury could find that defendants intended to inflict severe emotional distress. *Id.* Therefore, defendants are granted summary judgment on this claim.

## Conclusion

Defendants' motion for summary judgment (doc. # 21) is DENIED with respect to the following claims: violation of section 504 of the Rehabilitation Act, violation of Title III of the Americans with Disabilities Act, and negligence. Defendants' motion for summary judgment (doc. #21) is GRANTED with respect to the claims of defamation and intentional infliction of emotional distress.

IT IS SO ORDERED.

Dated this 13 day of October 1999.

/s/ Ann Aiken
Ann Aiken
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| ARWEN BIRD,<br><br>Plaintiff,<br><br>vs.<br><br>LEWIS & CLARK COLLEGE, THOMAS DARROW, PH.D., and LARRY A. MEYERS,<br><br>Defendants. | ) | Civil No. 98-691-AA<br><br>ORDER<br><br>(Filed Jul. 12, 2000) |

AIKEN, Judge:

This matter was tried to a jury beginning June 19, 2000. On June 30, 2000, the jury returned a verdict for the defendants on all claims, except for plaintiff's common law claim of breach of a fiduciary duty, where the jury found for the plaintiff.

Remaining for this court's ruling are plaintiff's claims for equitable relief pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12183 (ADA).

Plaintiff's claims for equitable relief pursuant to Section 504 and the ADA are denied, and no relief will be awarded. The court finds that the plaintiff did not prevail, by a preponderance of the evidence, on her claims pursuant to the Rehab Act or the ADA against the defendants. Further, the jury found that the defendants did not "violate Section 504 by denying the plaintiff the benefits of the Australia program solely due to her disability." *See* Verdict, p. 1.

Finally, regarding defendants' motions for judgment as a matter of law (doc. 160), motion #4 is now denied as moot.

IT IS SO ORDERED.

Dated this 11 day of July, 2000.

/s/ Ann Aiken
Ann Aiken
United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

ARWEN BIRD,

**Plaintiff,**

**v.** **Civil No. 98-691-AA**

LEWIS & CLARK COLLEGE,
THOMAS DARROW, PH.D.,
and LARRY A. MEYERS,

**Defendants.**

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**JUDGMENT**

(Filed Jul. 12, 2000)

IT IS ORDERED AND ADJUDGED that plaintiff shall recover from the defendants the sum of $5,000.00.

Dated: July 12, 2000.

/s/ Ann Aiken
United States District Judge

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF OREGON**

**CIVIL MINUTES**

**CASE NO: 98-691-AA** **DATE: September 25, 2000**

**CASE TITLE: Bird v. Lewis and Clark College, et al.**

**PRESIDING JUDGE: ANN AIKEN**

**DEPUTY CLERK: Christy Weller**

**COURT REPORTER:**

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Record of Order: Plaintiff's Motion for New Trial, to Alter/Amend Judgment and for Entry of Findings [Doc. #178] is denied pursuant to Fed. R. Civ. P. 52(b) and Rule 59(a).(b).

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PLAINTIFF'S COUNSEL DEFENDANT'S COUNSEL

cc: Chambers
Greg Austin
David Ernst
Kevin Karp

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ARWEN BIRD,<br>Plaintiff-Appellant,<br>v.<br>LEWIS & CLARK COLLEGE; THOMAS DARROW PhD; LARRY A. MEYERS,<br>Defendants-Appellees. | No. 00-35912<br>D.C. No. CV-98-00691-ALA<br>ORDER<br>(Filed Oct. 16, 2002) |

| | |
|---|---|
| ARWEN BIRD,<br>Plaintiff-Appellee,<br>v.<br>LEWIS & CLARK COLLEGE; THOMAS DARROW PhD; LARRY A. MEYERS,<br>Defendants-Appellants. | No. 00-35944<br>D.C. No. CV-98-00691-ALA |

Before: GOODWIN, T.G. NELSON, and W. FLETCHER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Nelson and Fletcher have voted to deny the petition for rehearing en banc, and Judge Goodwin recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

## Section 504 of the Rehabilitation Act of 1973 (as amended)

29 USCS § 794 (2001)

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [*29 USCS § 706*(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

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## Section 504 Regulations

SUBPART A – GENERAL PROVISIONS

34 CFR 104.4

§ 104.4 Discrimination prohibited.

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

* * *

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

* * *

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination

on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

* * *

SUBPART C – ACCESSIBILITY

34 CFR 104.21

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

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SUBPART C – ACCESSIBILITY

34 CFR 104.22

§ 104.22 Existing facilities.

(a) Accessibility. A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) Methods. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 104.23, or any other methods that result in making its

program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

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SUBPART E – POSTSECONDARY EDUCATION

34 CFR 104.41

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

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SUBPART E – POSTSECONDARY EDUCATION

34 CFR 104.43

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to

discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

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## SUBPART E – POSTSECONDARY EDUCATION

### 34 CFR 104.45

§ 104.45 Housing.

(a) Housing provided by the recipient. A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to

others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) Other housing. A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

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SUBPART G – PROCEDURES

34 CFR PART 104 APPENDIX A

SUBPART A – GENERAL PROVISIONS

* * *

6. General prohibitions against discrimination. Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) Prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

* * *

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

* * *

9. Remedial action. Where there has been a finding of discrimination, § 104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a

noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

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## SUBPART C – PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. Existing facilities. Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment,

reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

* * *

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

* * *

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is

flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 104.22(d).

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## SUBPART E – POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students

in postsecondary education programs and activities, including vocational education.

* * *

30. Treatment of students. Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

* * *

Under § 104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

* * *

32. Housing. Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a

recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

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## TITLE III OF THE AMERICANS WITH DISABILITIES ACT REGULATIONS

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§ 182. Prohibition of discrimination by public accommodations

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction.

(1) General prohibition.

(A) Activities.

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers

to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration –

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions.

(A) Discrimination. For purposes of subsection (a), discrimination includes –

* * *

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system.

(i) Accessibility. It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 304 [*42 USCS § 12184*] to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service. If a private entity which operates a fixed route system and which is not subject to section 304 [*42 USCS § 12184*] purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities

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§ 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or

trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

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## TITLE II OF THE AMERICANS WITH DISABILITIES ACT REGULATIONS

SUBPART D – PROGRAM ACCESSIBILITY

28 CFR 35.150

§ 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and

administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. . . . If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods – (1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

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## TITLE II OF THE AMERICANS WITH DISABILITIES ACT REGULATIONS – APPENDIX A

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Section 35.150 Existing facilities.

Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR part 39). The concept of "program accessibility" was first used in the section 504 regulation adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.

Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§ 35.150(a)(1)). Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is "readily achievable," or to provide goods and services

through alternative methods, where those methods are "readily achievable," title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

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Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. A similar limitation is provided in § 35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to

ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with § 35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of § 35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

* * *

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 FR 36035 (August 14, 1978). Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying. "Manifestly exceptional" cases in which carrying would be

permitted might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.)

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## SECTION 504 REGULATIONS OF THE DEPARTMENT OF JUSTICE

28 C.F.R. § 39.170

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The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general

parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1984) id., 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); id. at 38,552 (remarks of Rep. Sarasin).

Nine hundred and two comments that the Department received agreed that the obligations of section 504 for federally conducted programs should be identical to those developed by the Federal agencies over the past seven years for federally assisted programs. These commenters, however, objected to any language differences between the Department's proposed rule for federally conducted programs and the Department's section 504 coordination regulation for federally assisted programs (28 CFR Part 41). The commenters asserted that a number of language differences that the Department had proposed created less stringent standards for the Federal government than those applied to recipients of Federal assistance under section 504. They wrote that such a result could not be justified by Executive Order 12250, by the wording of the statute itself, nor by the legislative history of the 1978 amendments.

The commenters appear to have misunderstood the basis for inclusion of the new language in the DOJ regulation. The changes in this regulation are based on the Supreme Court's decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting Davis and section 504. See Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982);

American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983).

Some commenters questioned the use of Davis as justification for the inclusion of the new provisions in the federally conducted regulation. They noted that the Department had not included these changes when, subsequent to the Davis decision, it issued a regulation implementing section 504 in programs receiving Federal financial assistance from this Department. The Department's section 504 federally assisted regulation, however, was issued prior to the D.C. circuit's decision in APTA. In APTA, the Department had argued a position similar to that advocated by the commenters. Judge Abner Mikva's decision in APTA clearly rejected the Department's position in that case. Other circuit court decisions followed the APTA interpretation of Davis. Since these decisions, the Department has interpreted its section 504 regulation for federally assisted programs in a manner consistent with the language of this final rule. The Department believes that judicial interpretation of section 504 compels it to incorporate the new language in the federally conducted regulation.

Incorporation of these changes, therefore, makes this section 504 federally conducted regulation consistent with the Federal government's section 504 federally assisted regulations. Because many of these federally assisted regulations were issued prior to the judicial interpretations of Davis and its progeny, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be

interpreted to reflect the holdings of the Federal judiciary. Hence the Department believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

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## Architectural and Transportation Barriers Compliance Board (Access Board) Policy Interpretation No. 4

65 Fed. Reg. 62498-62500

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*Child Care Facilities*

*Comment.* The National Child Care Association (NCCA) questioned the estimated cost impact of the play area guidelines on child care facilities. NCCA claimed that the cost would be prohibitive for child care facilities. Child care providers who testified at the public hearing in Denver reiterated NCCA's concerns and noted that the guidelines would have the greatest impact on family child care providers. NCCA requested that carrying and lifting children on play areas be permitted as "alternative accessibility" or "equivalent facilitation," or that play areas in child care facilities for children ages 5 and under be exempted from the guidelines.

*Response.*

* * *

It has been a long standing interpretation of civil rights laws for individuals with disabilities that carrying and lifting are ineffective and unacceptable methods for providing accessibility, and thus NCCA's request in this regard cannot be accepted. n16 Challenge and skill development are both a part of the play experience, and children with disabilities are capable of enjoying this experience.

n16 See Appendix A to 28 CFR 35.150(b)(1) (http://www.usdoj.gov/crt/ada/reg2.html). See also *Rameriez* v. *District of Columbia,* No. 99-803 (TFH) (D.D.C. March 27, 2000) where the court decided that assigning an aide to carry a child with cerebral palsy into an inaccessible restroom in a public school violates the ADA.

## ITEMIZATION OF INACCESSIBLE LOCATIONS

| Day No | Date | Location | Summary |
|---|---|---|---|
| 1 | Sunday, January 14, 1996 | Sydney | House/dorm not accessible – could only get in or out when others were there to help (step-up into bedroom, no curb cuts, very steep short ramp to doorway with screen door and inside door that opened in opposite directions) Toilet seat was unstable and dangerous for transfer; No access to shower (sink blocked transfer into shower; could not reach shower head: 3-inch edge into shower; had to sit on a chair half-in and half-out of shower could only splash her legs with water; could only use sink by leaning sideways); Doorway from bedroom to bath very narrow (wheels scraped walls) and step into bath. |
| 2 | Monday, January 15,1996 | Sydney | *Housing, shower, bathroom inaccessible – Could not take same route as other students to classroom (across skyway), accessible route was down hill around behind building, across a divided highway, and back uphill to the classroom) |

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| 3 | Tuesday, January 16, 1996 | Sydney | *Housing, shower, bathroom inaccessible –<br>*Other students' route to classroom inaccessible |
| 4 | Wednesday, January 17, 1996 | Sydney | *Housing, shower, bathroom inaccessible –<br>*Other students' route to classroom inaccessible |
| 5 | Thursday, January 18, 1996 | Sydney | *Housing, shower, bathroom inaccessible –<br>*Other students' route to classroom inaccessible |
| 6 | Friday, January 19, 1996 | Sydney | *Housing, shower, bathroom inaccessible –<br>*Other students' route to classroom inaccessible<br>No accessible restrooms on Ferry during tour of bay and for trip to Oceanarium Ferry Ride was 2-3 Hours. |

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| 7 | Saturday, January 20, 1996 | Jervis Bay | Excluded from study of tidal pools – was not provided with any alternative activity at all; No accessible restroom at lodging; steps into bedroom; option of staying with group or separate location; Neither location was accessible; With group: either 3 steps into building with steps into rooms and a step into bathroom; Separate from group: very steep metal ramp, only restroom was outside, down steep ramp, into/across gravel yard (was not lit at night), bathroom was in separate building. |
| 8 | Sunday, January 21, 1996 | Jervis Bay | *Inaccessible lodging and restroom |
| 9 | Monday, January 22, 1996 | Sydney | Return to Sydney lodging and class – *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible |
| 10 | Tuesday, January 23, 1996 | Sydney | *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible (Visit to Aboriginal Land Counsel Office-stairs) |

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| 11 | Wednesday, January 24, 1996 | Sydney | *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible (Visit to Museum) |
| 12 | Thursday, January 25, 1996 | Sydney | *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible |
| 13 | Friday, January 26, 1996 | Sydney | *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible |
| 14 | Saturday, January 27, 1996 | Sydney | *Housing, shower, bathroom inaccessible – *Other students' route to classroom inaccessible (Visit to "The Rocks" and archeological sites) |
| 15 | Sunday, January 28, 1996 | Canberra | Depart to Canberra by bus; No lift for bus to Canberra, had to be carried on; (4 hour ride – no toilet access) Dorms not accessible; Whole building inaccessible – no curb cuts; Had to turn bed on its side for access to the room; Had to take bathroom door off hinges for access to bathroom; Cafeteria not accessible – up three stairs (Visit to Capital and War Memorial) |

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| 16 | Monday, January 29, 1996 | Canberra | *Bus not accessible<br>*Lodging, restrooms not accessible (no doors/no privacy)<br>*Cafeteria not accessible<br>(Visit to High Court canceled – given free day) |
| 17 | Tuesday, January 30, 1996 | Canberra | *Bus not accessible<br>*Lodging, restrooms not accessible (no doors/no privacy)<br>*Cafeteria not accessible<br>Morning meeting with Rob Elvish and Darrow: Discussed needs for Lamington. Mr. Elvish said he didn't understand why a catheter couldn't be left in permanently; didn't understand why she couldn't just get out on chair, onto ground, and then onto bed to avoid lowering cot; went off at length about cost of hotel – but she had not asked and did not want to stay in hotel, separate from class. Rob measured cot – to have one raised. She told him specific measurements had been provided.<br>(Lecture and visit to Parliament) |
| 18 | Wednesday, January 31, 1996 | Free time | Spent with Helen Supple, a family friend. |

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| 19 | Thursday, February 1, 1996 | Free time | Spent with Helen Supple, a family friend. |
| 20 | Friday, February 2, 1996 | Free time | Spent with Helen Supple, a family friend. |
| 21 | Saturday, February 3, 1996 | Free time | Spent with Helen Supple, a family friend. |
| 22 | Sunday, February 4, 1996 | Brisbane | Flight to Brisbane; Darrow had said he'd pick her up at airport, did not. Had to find strangers at airport to help with bags and getting to taxi. Darrow writes about this in journal. |

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| 23 | Monday, February 5, 1996 | Lamington | Travel to Lamington by bus – no access to bus. At campground, Rob Elvish became angry because bed was too high and she couldn't get into it from her chair, eventually decided to lower it; Rob Elvish said should be permanently catheterized, didn't understand why she couldn't get out of chair onto ground and then onto bed or onto the approximately one foot high potty stool he provided;<br>Restrooms were down gravel hill – inaccessible without assistance getting there, would have had to wake Tia and Emily in the middle of the night; Saved a juice bottle and used it to catheterize herself; No wheelchair accessible portable commode was provided;<br>Shower not accessible – used plastic chair, fixed shower head, difficult to get into water flow)<br>At the last minute, Rob Elvish said she would have to stay behind on hike, but refused to explain conditions or discuss options |

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| 24 | Tuesday, February 6, 1996 | Lamington | *No accessible restroom/shower (down gravel hill) – (Free day – did canopy walk) |
| 25 | Wednesday, February 7, 1996 | Lamington | *No accessible restroom/shower (down gravel hill) ([Missed] netting in morning – study in Eucalyptus forest) |
| 26 | Thursday, February 8, 1996 | Lamington | *No accessible restroom/shower (down gravel hill) (Worked on project with Mary Beth) |
| 27 | Friday, February 9, 1996 | Lamington | Leave Lamington by bus – bus is not accessible, had to be carried on *No accessible restroom/shower (down gravel hill) (partial day) |

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| 28 | Saturday, February 10, 1996 | Brisbane | Met home stay family – visited home stay residence Ledge into house – Ledge into bathroom, both difficult to enter; Bathtub had a shower board (rusting metal frame) – Because there was no back on the board, she had to hold onto faucet at all times for balance with one hand, while showering with the other hand (got detachable shower with hose); Flimsy toilet seat – thin plastic slid when she transferred on – no [grab] bars, used counter to transfer on and off toilet; Cab required for travel –trains and buses not consistently accessible (needed help on and off trains – accessibility of stops was unpredictable) |
| 29 | Sunday, February 11, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 30 | Monday, February 12, 1996 | Brisbane | First day of classes – University of Queensland at Brisbane<br>*Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 31 | Tuesday, February 13, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs)<br>Bus ride to Lone Pine Sanctuary – bus not accessible |
| 32 | Wednesday, February 14, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 33 | Thursday, February 15, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 34 | Friday, February 16, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 35 | Saturday, February 17, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 36 | Sunday, February 18, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 37 | Monday, February 19, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 38 | Tuesday, February 20, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 39 | Wednesday, February 21, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 40 | Thursday, February 22, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 41 | Friday, February 23, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 42 | Saturday, February 24, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 43 | Sunday, February 25, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 44 | Monday, February 26, 1996 | Brisbane | Meeting with Marta Hardeman, Tia, Emily, and Darrow – simple needs still not being addressed; attempts to plan ahead for Stradbroke Island<br>*Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 45 | Tuesday, February 27, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 46 | Wednesday, February 28, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 47 | Thursday, February 29, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 48 | Friday, March 1, 1996 | Brisbane | Free time – three day weekend – went to Byron Bay – Stayed in [hostel] that was very accessible |

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|---|---|---|---|
| 49 | Saturday, March 2, 1996 | Brisbane | Free time – three day weekend – went to Byron Bay – Stayed in [hostel] that was very accessible |
| 50 | Sunday, March 3, 1996 | Brisbane | Free time – three day weekend – went to Byron Bay – Stayed in [hostel] that was very accessible |
| 51 | Monday, March 4, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 52 | Tuesday, March 5, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 53 | Wednesday, March 6, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 54 | Thursday, March 7, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 55 | Friday, March 8, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 56 | Saturday, March 9, 1996 | Brisbane | Meeting with Dr. MacLennan, Darrow, Marta Hardeman, Emily, and Mark – Dr. MacLennan asks everyone but her and Darrow to leave – told her she would have to sign contract intended to waive her right to participate in field activities (3 monkeys meeting).<br>*Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 57 | Sunday, March 10, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 58 | Monday, March 11, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 59 | Tuesday, March 12, 1996 | Brisbane | Received actual copy of the contract they told her she would have to sign<br>*Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 60 | Wednesday, March 13, 1996 | Brisbane | Before morning class, talked to class about contract and whether they felt she had been a burden on the group<br>*Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 61 | Thursday, March 14, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 62 | Friday, March 15, 1996 | Brisbane | Last day of lectures<br>*Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 63 | Saturday, March 16, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 64 | Sunday, March 17, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 65 | Monday, March 18, 1996 | Strad-broke | First Hostel assured was accessible by GED, but it was not; Rooms had stairs into them, bed needed to be removed – not enough space to get between beds in wheelchair; Could not transfer off bed because it was offered no support at all and sunk down considerably with weight; Doorways to all bathroom stall were so narrow could not fit wheelchair in even if door was removed; Step/curb into shower – no seat in shower – could not reach shower head (was fixed on wall); (GED looks for different lodging for accessibility) Was provided with splintering, antique toilet; It was left out in the floor of the women's restroom with no door, no curtain, no privacy Second Hotel: step into room (could pull up step); beds were low, but were firm so transfer could be done; could get into restroom – no grab bars, but could get onto toilet (however, doorway would not close with wheelchair in room); Laura and Emily carried her in and out of shower; Was half an hour from rest of group; Traveled by bus (bus was wheelchair accessible – it had a lift) (Arwen agreed to stay in this location) |

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| 66 | Tuesday, March 19, 1996 | Stradbroke | *Room inaccessible, bathroom inaccessible, shower inaccessible Excluded from morning trawler run. No restroom access on trawler; No alternative scheduled for morning<br>(Everybody else went twice morning and afternoon – Arwen could only go in the afternoon (she had told them on the 9th about her need for morning restroom access in order to diurese) |
| 67 | Wednesday, March 20, 1996 | Stradbroke | *Room inaccessible, bathroom inaccessible, shower inaccessible |
| 68 | Thursday, March 21, 1996 | Brisbane | *Difficult access into homestay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 69 | Friday, March 22, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 70 | Saturday, March 23, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |
| 71 | Sunday, March 24, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 72 | Monday, March 25, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs)<br>Mtg held by TD and GED of whole group re: our schedule, AB's participation. |
| 73 | Tuesday, March 26, 1996 | Brisbane | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) Study day. Most students in the library. Library not accessible so AB stayed home. |
| 74 | Wednesday, March 27, 1996 | Brisbane (Exams) | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) |

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| 75 | Thursday, March 28, 1996 | Brisbane (Exams) | *Difficult access into home-stay, board for taking shower, flimsy plastic toilet seat slid sideways when transferring created risk of falling especially if it broke<br>*Needed funds for taxi to travel to and from class<br>*No access to library (up two flights of stairs) Took taxi to airport to ship chair home. No assistance from L&C or GED. |
| 76 | Friday, March 29, 1996 | Carnarvon | 11 hour bus ride to Carnarvon. Bus not accessible. Stops made to urinate at inaccessible bathrooms. Avoided drinking fluids as much as possible.<br>*Fixed shower head, no bars in toilet or shower. |
| 77 | Saturday, March 30, 1996 | Carnarvon | *Fixed shower head, no access bars in shower or toilet. |
| 78 | Sunday, March 31, 1996 | Carnarvon | Not allowed to go on group hike that MH had said was something they would make sure AB didn't miss. Lecture hall inaccessible (4 steps). Bathroom in lecture hall inaccessible.<br>*fixed shower head, no access bars in shower or toilet |

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| 79 | Monday, April 1, 1996 | Carnarvon | (Balloon caves inaccessible due to stairs – piggy backed) *fixed shower head, no access bars in shower or toilet |
| 80 | Tuesday, April 2, 1996 | Rubyvale | Bus to Rubyvale inaccessible. At camp, inaccessible shower. |
| 81 | Wednesday, April 3, 1996 | Rubyvale | Exclude from mine at Rubyvale BUT she was forewarned about this. No Alt activity provided. *shower inaccessible, |
| 82 | Thursday, April 4, 1996 | Kroombitz | Bus to Kroombitz inaccessible. Bedroom inaccessible (step). |
| 83 | Friday, April 5, 1996 | Kroombitz<br>Cattle Ranch | *Bedroom inaccessible. |
| 84 | Saturday, April 6, 1996 | Kroombitz<br>Cattle Ranch | *Bedroom inaccessible. |
| 85 | Sunday, April 7, 1996 | Kroombitz<br>Cattle Ranch | *Bedroom inaccessible |

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| 86 | Monday, April 8, 1996 | Glad-stone | Bus to Gladstone inaccessi-ble. Bathroom inaccessible. Shower inaccessible. Sink inaccessible. |
| 87 | Tuesday, April 9, 1996 | Heron Island | Boat to Island inaccessible. Shower inaccessible. Reef walk inaccessible – no alternative provided. |
| 88 | Wednesday, April 10, 1996 | Heron Island | *Shower inaccessible. (Studied reef on pool float) |
| 89 | Thursday, April 11, 1996 | Heron Island | Lecture room inaccessible (steps)<br>*Shower inaccessible |
| 90 | Friday, April 12, 1996 | Heron Island | *Shower inaccessible (Snorkeled) |
| 91 | Saturday, April 13, 1996 | Heron Island | *Shower inaccessible |
| 92 | Sunday, April 14, 1996 | Glad-stone | Boat to Gladstone inaccessi-ble.<br>*Bathroom inaccessible, Shower inaccessible, Sink inaccessible. |
| 93 | Monday, April 15, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 94 | Tuesday, April 16, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |

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| 95 | Wednesday, April 17, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 96 | Thursday, April 18, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 97 | Friday, April 19, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 98 | Saturday, April 20, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 99 | Sunday, April 21, 1996 | Free time | traveled with Laura, Jared, and Emily found accessible locations. |
| 100 | Monday, April 22, 1996 | Coconut Beach | Bus to Coconut Beach inaccessible. Bedroom inaccessible (step). Dining room inaccessible, shower inaccessible. |
| 101 | Tuesday, April 23, 1996 | Coconut Beach | Lecture hall inaccessible *Dining room inaccessible, Bedroom inaccessible, Shower inaccessible. |
| 102 | Wednesday, April 24, 1996 | Inn at the Tropics | *Shower inaccessible, no privacy in toilet. |
| 103 | Thursday, April 25, 1996 | Inn at the Tropics | *Shower inaccessible, no privacy in toilet. |

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| 104 | Friday, April 26, 1996 | Inn at the Tropics | *Shower inaccessible, no privacy in toilet. |
| 105 | Saturday, April 27, 1996 | Inn at the Tropics | *Shower inaccessible, no privacy in toilet |
| 106 | Sunday, April 28, 1996 | Inn at the Tropics | *Shower inaccessible, no privacy in toilet |

**Plaintiff's Exhibit 163**

**CIVIL RIGHTS CERTIFICATE**

**ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975**

The applicant provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Education.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

3. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

5. All regulations, guidelines, and standards lawfully adopted under the above statutes by the United States Department of Education.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which such assistance is provided. The applicant further assures that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education programs or activities are not discriminating in violation of the above statutes, regulations, guidelines, and standards against those students or employees. In the event of failure to comply the applicant understands that assistance can be terminated and the applicant denied the right to receive further assistance. The applicant also understands that the Department of Education may at its discretion seek a court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature(s) appear(s) below is/are authorized to sign this application, and to commit the applicant to the above provisions.

February 18, 1981 /s/ [Illegible]
**Date** **Authorized Official(s)**
**President**

Lewis & Clark College
**Name of Applicant or Recipient**

0615 S. W. Palatine Hill Rd.
**Street**

Portland, Oregon 97219
**City, State, Zip Code**

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## CIVIL RIGHTS CERTIFICATE

## ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975

The applicant providers this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, or other Federal financial assistance to education programs or activities from the Department of Education.

The applicant assures that it will comply with:

1. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

2. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

3. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

4. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

5. All regulations, guidelines, and standards lawfully adopted under the above statutes by the United States Department of Education.

The applicant agrees that compliance with this Assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the applicant, its successors, transferees, and assignees for the period during which such assistance is provided. The applicant further assures that all contractors, subcontractors, subgrantees or others with whom it arranges to provide services or benefits to its students or employees in connection with its education programs or activities are not discriminating in violation of the above statutes, regulations, guidelines, and standards against those students or employees. In the event of failure to comply the applicant understands that assistance can be terminated and the applicant denied the right to receive further assistance. The applicant also understands that the Department of Education may at its discretion seek a

court order requiring compliance with the terms of the Assurance or seek other appropriate judicial relief.

The person or persons whose signature(s) appear(s) below is/are authorized to sign this application, and to commit the applicant to the above provisions.

January 20, 1982 /s/ [Illegible]
**Date** **Authorized Official(s)**

Lewis & Clark College
**Name of Applicant or Recipient**

0615 S. W. Palatine Hill Rd.
**Street**

Portland, Oregon 97219
**City, State, Zip Code**

**Agreement**

**between**
**Global Education Designs Pty Ltd,**

**and**
**Arwen Bird**

Date: _____

I, Arwen Bird, agree to the following:

1. I will at all times accede to Global Education Designs' field program manager's assessment of where in the field it is safe and feasible for me to go in the circumstances prevailing at the time.

2. I will at all times accede to Global Education Designs' field program manager's assessment of what field activities are appropriate for me to participate in.

3. I will at all times promptly and accurately comply with any direction relating to issues of safety or field activities connected with the academic program that may be given to me by any of the following people:

   a. Global Education Designs' duly appointed field manager.

   b. any person employed or contracted by Global Education Designs to act on behalf of the field program manager,

   c. Professor Tom Darrow or any duly appointed representative of Lewis & Clark College.

Signed _____ Date _____

**Criteria**

The criteria used by our field program manager or their representative to determine whether Arwen should or should not go to any particular place in the field or participate in any particular field activity will be:

1. Will, in the sole opinion of the program manager or their duly appointed representative, Arwen's personal safety by put at any risk by her going to a particular place or undertaking a particular activity?

2. Will, in the sole opinion of the program manager or their duly appointed representative, the personal safety of any other person be put at any risk by Arwen's going to a particular place or undertaking a particular activity?

3. Will, in the sole opinion of the program manager or their duly appointed representative, the quality of the academic experience of other students by unduly diminished by Arwen's going to a particular place or undertaking a particular activity?

4. Does Arwen herself have any reservations about going to a particular place or undertaking a particular activity?

If the answer to all of these questions is 'no', then the field program manager will have no objection to Arwen's going to the particular place in question or undertaking the particular activities in question. If the answer to any one of these questions is 'yes', then the field program manager will direct that Arwen not go to the particular place in question or undertake the particular activities in question.

These criteria will be strictly applied in all cases where there is any question in the mind of the program manager

or their duly appointed representative as to the advisability of Arwen going to any particular place or undertaking any particular activity. *Criteria 1 and 2* above will be determined solely by Global Education Designs' field program manager or their duly appointed representative. *Criterion 3* above will be determined by the field program manager or their duly appointed representative in consultation with Professor Darrow, Arwen and the other Lewis & Clark College students, but the final decision on the matter will be the sole prerogative of Global Education Designs' field program manager or their duly appointed representative. *Criterion 4* will be determined by Arwen Bird alone.

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